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No. 07-

IN THE

Supreme Court of the United States

MIRYAM BALCAZAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decisions herein of the United States District Court for the Southern District of Texas (the "District Court") and the Fifth Circuit Court of Appeals (the "Fifth Circuit") treating Petitioner's first motion filed under § 2255 of Title 28 of the United States Code as a filing for purposes of § 2255 are in direct conflict with longstanding Supreme Court and Fifth Circuit precedent, holding that an agency relationship fraudulently entered into is void *ab initio* and that, under such circumstances, a principal, is not bound by the acts of the agent.

2. Whether the decisions below are in direct conflict with Supreme Court precedent requiring lower courts to carefully ascertain whether a motion is "second or successive" for purposes of § 2255.

3. Whether a fraud upon the court was perpetrated herein, causing a breakdown in the integrity and fundamental fairness of the judicial system, such that this Court's general power to supervise the administration of justice in federal courts is invoked providing a compelling reason for a Writ of Certiorari to be granted where the District Court and the Fifth Circuit acquiesced to the filing of Petitioner's first § 2255 motion by an unauthorized agent who filed such document with the court under fraudulent circumstances.

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OPINIONS AND ORDERS BELOW

On February 13, 2007, the Fifth Circuit issued an Order denying Petitioner's Application for a Certificate of Appealability ("COA") on the basis that Petitioner failed to make a substantial showing of "the denial of a constitutional right" (the "Order Denying the COA"). The Order Denying the COA is set forth in Appendix A. The District Court's order Adopting the Recommendation of the Magistrate Judge entered January 23, 2006 and the Memorandum and Recommendation Granting the Government's Motion to Dismiss entered on October 28, 2005 (the "Memorandum and Recommendation") are set forth in Appendix B and C, respectively. The Final Judgment of the District Court, entered on January 23, 2006, adopted the Memorandum and Recommendation in its entirety and ordered that Petitioner's Application for a COA is denied (the "Final Judgment").

STATEMENT OF JURISDICTION

On May 14, 2007, the Fifth Circuit issued an unpublished *Per Curiam* Opinion (the "Opinion") denying Petitioner's Motion for Reconsideration.[1] The Opinion is set forth in Appendix E. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The pertinent sections are set forth in Appendix D.

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[1] On March 30, 2007, upon *sua sponte* request of the Fifth Circuit, Petitioner consented to changing the caption of her "Petition for Panel Rehearing" to a "Motion for Reconsideration".

STATEMENT OF THE CASE

This Petition for Writ of Certiorari seeks review of an unpublished *Per Curiam* decision of the Fifth Circuit upholding the District Court's finding that Petitioner's § 2255 motion filed on May 6, 2005 by undersigned counsel (hereinafter referred to as Petitioner's current § 2255 motion)[2] seeking post-collateral relief is "second or successive" for purposes of § 2255 of Title 28 of the United States Code ("U.S.C." and hereinafter generally referred to as § 2255).

Petitioner respectfully asserts that her current § 2255 motion is her "first filing" for § 2255 purposes. This contention is premised on the fact that Petitioner's first § 2255 motion filed on July 8, 1994 should be treated as a nullity because it was filed by an unauthorized agent, Burton Pugach ("Pugach") (hereinafter referred to as the "Pugach Document"), a convicted felon, who fraudulently entered a federal penitentiary under the guise of being a licensed attorney, and fraudulently induced Petitioner to appoint him as her agent to file such document and to represent her at a hearing, if one should be set.

Given that the purported agency-principal relationship entered into between Pugach and Petitioner was based on fraud it is void *ab initio*; and therefore, Petitioner is not bound by Pugach's unauthorized acts. As such, Pugach's unauthorized filing of the Pugach Document cannot be imputed to Petitioner. Thus, Petitioner respectfully asserts that her current § 2255 motion be treated as her "first" § 2255 motion.

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[2] For avoidance of doubt, Petitioner's current § 2255 motion filed with the District Court is labeled "Petition for Relief Under 28 U.S.C. § 2255".

The Fifth Circuit disagreed and refused to issue a COA to Petitioner holding that she failed to make a substantial showing of "the denial of a constitutional right." However, Petitioner was never provided with an opportunity to demonstrate that Pugach was *not* Petitioner's authorized agent, that he lied to her, and therefore, that the Pugach Document should not be treated as Petitioner's first filing for § 2255 purposes. Had Petitioner been provided with this opportunity she would have shown that the proceedings leading up to the filing of the Pugach Document were infected with constitutional violations at so many different and fundamental levels that they represent a manifest injustice from outset to end. The relevant facts leading up to the filing of the Pugach Document are as follows:[3]

Following an arrest on drug-related charges, Petitioner, a single mother and first-time offender, was represented at trial and on direct appeal by her attorney, Mark Vela ("Vela").[4] Vela served under an actual conflict of interest in violation of Petitioner's unwaivable Sixth Amendment right to conflict-free counsel. Vela held himself out to the District Court as Petitioner's attorney, but in fact was acting as "house counsel" for a Colombian drug cartel (the "Cartel") the same organization that had been supplying the drugs to Petitioner's co-defendants. The Cartel was paying Vela to represent Petitioner.[5] Despite this, at the time, Petitioner believed that Vela was acting in her best interest. However, Vela's true function was not to represent Petitioner, but to keep Petitioner

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[3] The summarized facts leading up to the filing of the Pugach Document discussed herein are fully set forth in Petitioner's current § 2255 motion.

[4] Vela is now deceased.

[5] The Cartel not only paid the legal fees for Vela's alleged representation of Petitioner, but it also paid the legal fees of the two attorneys who were allegedly representing Petitioner's co-defendants.

from cooperating with the government. Vela's representation of Petitioner was in actual conflict with his true loyalty to the Cartel, as well as with his own self-interest in his firm's retainer agreement.

In violation of Petitioner's unwaivable Sixth Amendment right to conflict-free counsel, Vela's actions provided Petitioner not with a defense attorney, but with a second prosecutor. For example, Vela told Petitioner not to take a 10-year reduced sentence in exchange for a guilty plea and her cooperation because she could not be sentenced to more than 5 years imprisonment since she had no drugs or weapons on her person or premises at the time of her arrest. However, Vela intentionally concealed the fact that Petitioner faced a 25-year maximum sentence based on the actions of her co-defendants, knowing full well that in a RICO proceeding it was irrelevant that Petitioner had not been found with weapons or drugs. On advice of Vela, Petitioner also orally waived her right to a trial by jury, without requesting a judicial colloquy regarding the significant ramifications of waiving such a fundamental constitutional right. In fact, at trial, it was actually the *prosecutor* who raised with the presiding judge the fact that this was a serious act on Petitioner's part and that the judge should question Petitioner to be sure she understood the magnitude of her decision. On further advice from Vela, Petitioner consented to a combined Mapp hearing and a joint bench trial with her co-defendants on the issue of guilt or innocence with the same judge presiding over both proceedings. After Petitioner was convicted, Vela filed a late motion for a new trial, well beyond the statutory time period for filing such a motion, which was denied for lack of jurisdiction. Thereafter, Vela filed a motion for an out-of-time appeal which the Fifth Circuit granted.[6]

[6] This was a joint motion filed on Petitioner's behalf by Vela and on her co-defendant's behalf by his defense counsel, who also represented him at trial. This motion was not treated as "second or successive" for purposes of § 2255 because it was merely procedural.

These are *just a few* examples of how Vela failed to advocate Petitioner's cause by engaging in acts that were grossly deleterious to her interests, filing untimely appeals and motions and failing to put forth plausible legal strategies, which effectively waived her constitutional right to a meaningful trial. Vela's actual conflict of interest as house counsel for the Cartel adversely affected his performance and prejudiced Petitioner at all stages of the proceedings. To Petitioner's severe detriment, this critical constitutional argument has never been heard by any court because Pugach failed to raise it in the Pugach Document filed by him allegedly on Petitioner's behalf.

Petitioner met Pugach in 1994 while incarcerated at the MCI penitentiary in Danbury, Connecticut (the "MCI"). She is now serving time at Coleman Penitentiary in Coleman, Florida. At the time, Pugach represented himself as an attorney — indeed, it was in reliance on this representation that MCI permitted Pugach to meet with Petitioner and with other inmates to offer his legal assistance. Pugach led Petitioner to believe that he was a well-respected criminal appeals attorney. Petitioner's family subsequently paid him approximately $7,500 to draft and file a collateral appeal on her behalf (the Pugach Document), which the District Court and Fifth Circuit have treated as her first § 2255 motion. Pugach drafted the § 2255 motion; however, he crafted the last page to read "Miryam Balcazar Appearing Pro Se." Petitioner, an uneducated women for whom English is a second language, believed she was filing the § 2255 motion *through* Pugach as if he were representing her; Petitioner also expected that Pugach would represent her as her counsel at a hearing, had one been granted. Petitioner had no way of knowing that Pugach was disbarred and had served fourteen years in prison following a conviction for burglary and for maiming his girlfriend by hiring hit men to throw scorching liquid lye on her face. *See Riss v. City of New York*, 240 N.E.2d 860, 862 (N.Y. App. Div. 1968) (Keating, J.,

dissenting); *In the Matter of Burton N. Pugach*, 3 and 5 (N.Y. App. Div. Dec. 15, 1960); *People v. Pugach*, 688 N.Y.S.2d 868, 869-70 (1999) as set forth in Appendix F, G and H, respectively. It was not until quite some time into undersigned counsel's representation of Petitioner that Petitioner learned that Pugach had fraudulently induced her to enter into an agency-principle relationship by misrepresenting himself to her as a licensed attorney, when in actuality Pugach had been disbarred in 1960 and had a history of violent unstable behavior. Indeed, as is reflected in Appendix I, the District Attorney in Queens, New York, has investigated Pugach for engaging in the unauthorized practice of law. *See Pugach v. First Dep't Disciplinary Comm.*, No. 01-CV-1330 (E.D.N.Y. Aug. 22, 2001).

By treating the Pugach Document as Petitioner's first filing for § 2255 purposes the District Court and Fifth Circuit have caused Petitioner to suffer severe detriment, because Pugach never raised Petitioner's most critical argument: that Vela, the attorney on whom she relied at trial and on appeal, was acting under an actual, unwaivable conflict of interest in violation of Petitioner's Sixth Amendment right to conflict-free counsel.

Therefore, Petitioner respectfully requests that a Writ of Certiorari be granted, and that this Court find that the current § 2255 motion filed by undersigned counsel is Petitioner's first filing for purposes of § 2255.[7]

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[7] Alternatively, based on the facts herein, Petitioner respectfully submits that summary reversal of the Fifth Circuit also would be appropriate in lieu of granting Petitioner a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

Pursuant to Rule 10 of the Supreme Court Rules, Petitioner respectfully requests that this Court grant Certiorari for the following compelling reasons:

1. The District Court entered a decision herein, which has now been affirmed by the Fifth Circuit in direct conflict with longstanding precedent in this Court and in each of the Circuits, and as such, has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power;

2. The decisions of the District Court and the Fifth Circuit herein directly conflict with this Court's precedent requiring lower courts to carefully ascertain whether a motion is "second or successive" for purposes of § 2255; and

3. A fraud upon the court will have been perpetrated if the decisions below are left to stand.

SUMMARY OF THE ARGUMENTS

1. Petitioner's position on the first question presented is the following:

In treating the Pugach Document as Petitioner's first filing for purposes of § 2255, the District Court and the Fifth Circuit decisions are in direct conflict with recognized Supreme Court and Fifth Circuit precedent all of which hold that an agency relationship fraudulently entered into is void *ab initio,* and under such circumstances, the principal is not bound by the acts of the agent. As such, the Pugach Document should be treated as a nullity since the agency-principal relationship was induced by fraud, and therefore, any acts that Pugach engaged in as principal on Petitioner's behalf,

such as the filing of the Pugach Document, should be treated as null and void. Thus, the current § 2255 motion should be treated as Petitioner's "first filing" for purposes of § 2255. Moreover, Petitioner respectfully asserts that the District Court's disregard of this longstanding precedent which was affirmed by the Fifth Circuit, so far departs from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's supervisory power.

2. Petitioner's position on the second question presented is the following:

The decisions of the District Court and the Fifth Circuit are in direct conflict with Supreme Court precedent requiring courts to carefully ascertain whether a motion is "second or successive" for purposes of § 2255. In the instant case, the lower courts completely failed to address the fraudulent agency argument in analyzing whether the Pugach Document should be treated as Petitioner's "first" § 2255 motion. Instead, the District Court held that since Petitioner is not entitled to effective assistance of counsel in filing a § 2255 motion the fact that Pugach was not a lawyer is immaterial and does not vitiate the validity of the prior petition. However, contrary to the District Court's assertion, Petitioner is not arguing that the Pugach Document should be disregarded on the grounds of ineffective assistance of counsel, but that the Pugach Document should be disregarded because Petitioner cannot be bound by the acts of an unauthorized agent who induced her to enter into the principal-agency relationship under fraudulent pretenses.[8]

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[8] This argument was fully set forth in Petitioner's Objections to the Magistrate Judge's Memorandum and Recommendation Granting the Government's Motion to Dismiss, filed with the District Court on November 14, 2005.

3. Petitioner's position on the third question presented is the following:

In approving the acts of an unauthorized agent, who fraudulently induced Petitioner into representing her and, who filed fraudulent documents with the court, both the District Court and the Fifth Circuit acquiesced in a fraud upon the court. Allowing a fraud of this nature to occur will cause a breakdown in the integrity and fundamental fairness of the judicial system, such that this Court's general power to supervise the administration of justice in federal courts is invoked to provide a compelling reason for a Writ of Certiorari to be granted herein.

ARGUMENTS

1. The decisions of the District Court and the Fifth Circuit treating the Pugach Document as a first filing for § 2255 purposes, thereby rendering the current § 2255 motion as "second or successive", are in direct conflict with longstanding Supreme Court and Fifth Circuit precedent holding that an agency relationship predicated on fraud is void *ab initio*, and that, under such circumstances, a principal is not bound by the acts of the agent.

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (the "AEDPA"), before filing a "second or successive motion" under § 2255, a prospective petitioner is required to seek prior authorization from the appropriate court of appeals. The court of appeals will certify a "second or successive" petition according to the guidelines set forth in 28 U.S.C. §2244(b). These requirements do not apply if a petition is not considered "second or successive." *See In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998). Therefore, if for purposes of § 2255, the current § 2255 motion is not considered second or successive, Petitioner was not required

to obtain authorization via a COA from the Fifth Circuit to file her motion with the District Court.

For the reasons discussed herein, Petitioner respectfully asserts that she correctly filed her current § 2255 motion in the District Court without requesting a COA from the Fifth Circuit because such motion is not "second or successive" for § 2255 purposes.

This Court has acknowledged that "[t]he phrase "second or successive" is not self-defining". *Panetti v. Quarterman*, No. 06-6407, slip op. (U.S. June 28, 2007). The fact that a § 2255 motion is filed subsequent to another document styled as a § 2255 motion does not suffice to render a later-in-time motion "second or successive." *See In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998). A "second or successive" petition is one that either: "(1) raises a claim challenging the petitioner's conviction or sentence that was or could have been raised in an earlier petition; or (2) otherwise constitutes an abuse of the writ." *United States v. Orozco-Ramirez*, 211 F.3d 862, 867 (5th Cir. 2000) (quoting *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998)).

As such, in determining whether a petition is "second or successive" this Court and the Fifth Circuit have applied specific, pragmatic principles. For example, in *Panetti v. Quarterman*, No. 06-6407, slip op. (U.S. June 28, 2007) this court emphasized that the term "second or successive" "takes its full meaning from our case law, including decisions predating the enactment of the [AEDPA]." Thus, rather than interpreting "second or successive" as referring to all § 2255 motions that are numerically second or successive in time with respect to an earlier motion, this Court has considered the practical effects of treating a motion as second or successive, especially if doing so would "produce troublesome results." *Castro v. United States*, 540 U.S. 375, 380 (2003).

For example in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), this Court rejected a plain meaning of the phrase "second or successive" and held that a petition or motion is not second or successive within the meaning of the AEDPA merely because it is numerically second. In so reasoning, this Court emphasized that the AEDPA's "second or successive" language should not be read hypertechnically to penalize movants who file a second or successive petition to litigate claims that were not properly the subject of adjudication in a previous petition. *Id.* at 643-45. This Court further eschewed a literal construction of the term second or successive that would produce "far reaching and seemingly perverse" results by applying a restrictive successive petition standard. *Id.* at 644. Instead, this Court indicated that an earlier petition should not count as the first if counting it as such would unfairly deprive a petitioner of an adjudication of a claim. More recently, this Court reached a similar conclusion in *Panetti v. Quarterman*, holding that "the statutory bar on 'second or successive' applications does not apply to a *Ford* claim brought in an application filed when the claim is first ripe."

While *Martinez-Villareal* addresses a petitioner who filed subsequent petitions to litigate claims previously dismissed for nonexhaustion and *Panetti v. Quarterman* addresses the applicability of § 2244(b) where a prisoner raises a *Ford* claim for the first time in a petition filed after the federal courts have already rejected the prisoner's initial habeas application, this Court's precedent is equally applicable herein. Counting the Pugach Document — a filing by an unauthorized agent acting under fraudulent pretenses — as Petitioner's "first filing" for § 2255 purposes would unfairly deprive Petitioner of her "one, full and fair opportunity to wage a collateral attack" since the Pugach Document failed to raise the single most critical challenge to Petitioner's conviction, namely, that her trial attorney had an actual

conflict of interest in violation of her Sixth Amendment right to conflict-free counsel. Moreover, when the opportunity first arose for Petitioner to raise this fraudulent agency argument, which was at the time counsel herein filed the current § 2255 motion, Petitioner did so. Thus, in the instant case, where there is no abuse of the writ because Petitioner raised this fraud argument as soon as it became ripe and where severe prejudice would result if Petitioner were forever barred from asserting that her trial attorney acted under an actual unwaivable conflict of interest in violation of her Sixth Amendment right to conflict-free counsel, Petitioner respectfully asserts that this Court should not hold Petitioner to the Pugach Document, but instead should treat it as a nullity since Pugach was not her authorized agent.

In general, courts have assumed that the relationship between lawyer and client is one of agency.[9] As such, longstanding precedent in this Court and in the Fifth Circuit, as well as common law agency principles and basic notions of justice and fundamental fairness make clear that a person,

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[9] *See Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962 (1st Cir. 1993) (stating that the relationship between lawyer and client is fiduciary); *In re Artha Management, Inc.*, 91 F.3d 326 (2d Cir. 1996) (affirming that the relationship between a lawyer and client is one of agent and principal); *Committee on Professional Ethics and Grievances of Virgin Islands Bar Ass'n v. Johnson*, 447 F.2d 169 (3d Cir. 1971) (holding that an attorney-client relationship is one of agency); *St. Paul Ins. Co. of Bellaire, Texas v. AFIA Worldwide Ins. Co.*, 937 F.2d 274 (5th Cir. 1991) (affirming that the relationship between attorney and client is one of principal and agent); *Rothman v. Wilson*, 121 F.2d 1000 (9th Cir. 1941) (holding that the relationship between an attorney and client is one of agency and the general rules of agency apply); *Brinkley v. Farmers Elevator Mut. Ins. Co.*, 485 F.2d 1283 (10th Cir. 1973) (holding that the relation between attorney and client is one of agency to which general rules of agency apply); *Hensley v. U. S.*, 281 F.2d 605 (D.C. Cir. 1960) (affirming that the relation of attorney and client is one of agency and the general rules of agency apply).

such as Petitioner, who is induced by fraud to accept an agent with fiduciary responsibilities, cannot ultimately be held liable for the acts of the agent.[10] Moreover, when an agent, by self-serving conduct, so abandons a principal's interest as to act adversely to those interests, or worse to act in fraud on the principal, the agency ceases and the principal is not bound by the acts or declarations of the agent. 27 Williston on Contracts § 69:44 (4th ed.); *see also Advocare International, L.P. v. Horizon, Inc.*, No. 3:04-CV-1988-H, 2006 U.S. Dist. LEXIS 1170 (N.D. Tex. January 5, 2004). The agreement to act on behalf of a principal causes the agent to be a fiduciary to act primarily for the benefit of another in matters connected with his undertaking and concealment of the facts constitutes actionable fraud in such context.[11] Accordingly, it would be a violation of this fundamental principle to bind Petitioner to the act of an unauthorized agent to her severe detriment.

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[10] *See e.g. Cochran v. Cummings*, 4 U.S. 250 (1802) (noting that "[w]herever there is a gross misrepresentation of facts, relating to the subject of a contract, the contract is fraudulent and void."); *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962); *Laird v. Air Carrier Engine Service, Inc.*, 263 F.2d 948 (5th Cir. 1959); *Janvey v. Thompson & Knight LLP*, No. 3:03-CV-158-M, 2004 WL 51323, at *4 (N.D. Tex. Jan. 5, 2004).

[11] Under Texas law, a duty to speak arises by operation of law, such that a failure to do so constitutes a fraud, when (1) a confidential or fiduciary relationship exists between the parties; or (2) one party learns later that his previous affirmative statement was false or misleading; (3) one party knows that the other party is relying on a concealed fact, provided that the concealing party also knows that the relying party is ignorant of the concealed fact and does not have an equal opportunity to discover the truth; or (4) one party voluntarily discloses some but less than all material facts, so that he must disclose the whole truth, i.e., all material facts, lest his partial disclosure convey a false impression. *Union Pacific Resources Group, Inc. v. Rhone-Poulenc, Inc.*, 247 F.3d 574, 586 (5th Cir. 2001).

In holding that the Pugach Document is Petitioner's first § 2255 motion, and thereby disregarding long-standing precedent in this Court, and in each of the Circuits, as well as common law doctrine regarding the legality of fraudulent contracts and the scope of the agent-principal relationship, the District Court (as affirmed by the Fifth Circuit) "has so far departed from the accepted and usual course of judicial proceeding . . . as to call for an exercise of [this Court's] supervisory power." Sup. Ct. Rule 10(a); *McNabb v. United States*, 318 U.S. 332 (1943).

Accordingly, for the foregoing reasons, Petitioner respectfully submits that this Court disregard the Pugach document as a nullity and grant Petitioner her first true opportunity to challenge her conviction, which was tainted by a conflict of interest in violation of her Sixth Amendment right to conflict-free counsel.

2. The decisions of the District Court and the Fifth Circuit herein are in direct conflict with Supreme Court precedent requiring lower courts to carefully ascertain whether a motion is "second or successive" for purposes of § 2255.

This Court has strongly admonished lower courts to carefully determine whether a § 2255 motion is second or successive for purposes of the AEDPA.[12] In Petitioner's case,

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[12] *See e.g., Panetti v. Quarterman*, No. 06-6407, slip op. (U.S. June 28, 2007); *Castro v. United States*, 540 U.S. 375, 380 (2003); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998); *Felker v. Turpin*, 518 U.S. 651, 664 (1996).

however, the District Court and the 5th Circuit failed to heed this Court's warning and as a consequence, the requisite inquiry as to what constitutes a "second or successive" motion for purposes of § 2255 was never made.

In Petitioner's submissions to the District Court, she proffered several reasons for why the so-called "first" motion (the Pugach Document), for which she was purportedly represented by Pugach, should be considered a nullity. However, to Petitioner's detriment, the District Court never considered the critical "fraudulent agency argument" that Petitioner raised in support of this contention.[13] Rather, the District Court denied Petitioner's current § 2255 motion based on grounds of ineffective assistance of counsel.

On page 5 of the Memorandum and Recommendation, the District Court Magistrate Judge notes that

> "to the extent Balcazar argues that the § 2255 proceeding should not be considered a second or successive § 2255 proceeding because she raises a claim herein — that the attorney who prepared the prior § 2255 motion was ineffective . . . It is well settled that the defendant has no constitutional right to effective assistance of counsel in a post-conviction collateral proceeding."

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[13] This argument was fully set forth in Petitioner's Objection to the Magistrate Judge's Memorandum.

Thus, the District Court held that since Petitioner is not entitled to effective assistance of counsel in filing a § 2255 motion, the fact that Pugach was not a lawyer is immaterial and did not vitiate the validity of the prior petition.

Contrary to the District Court's findings, Petitioner did not only argue that the Pugach Document should be disregarded on the grounds of ineffective assistance of counsel. Rather, Petitioner also contended that the Pugach Document should be disregarded because she cannot be bound by the acts of an unauthorized agent. By solely focusing on whether Pugach effectively represented Petitioner, we respectfully submit that the District Court overlooked one of the grounds on which Petitioner asserted that her current § 2255 motion is not second, which is that under basic agency principles, the Pugach Document must be treated as a nullity. Whether Pugach was effective in his representation had no bearing on this argument, other than to show that Petitioner was severely prejudiced by his acts. Whether Pugach was disbarred had bearing only to the extent that he induced Petitioner to enter into an agency relationship under false pretenses. Thus, the District Court's focus on these two points in terms of ineffective assistance of counsel misapprehended the core of Petitioner's fraudulent agency argument and the grounds upon which Petitioner asserted the Pugach Document should be disregarded. Petitioner simply argued that because the agency relationship was predicated on fraud, she was not bound by Pugach's acts.

Rather than focus on the false pretense aspect of Petitioner's arguments, the District Court relied upon *Pennsylvania v. Finley*, 481 U.S. 551 (1987) for the proposition "that a defendant has no constitutional right to the effective assistance of counsel in a post-conviction collateral proceeding such as this."[14] While, the

[14] This proposition is not free from doubt. In *Finley*, the Supreme Court held that there was no constitutional right to counsel under (Cont'd)

ineffectiveness of Pugach was discussed in Petitioner's current § 2255 motion, this point was raised to show that this unauthorized agent's so-called "§ 2255 motion" was in fact defective and caused severe prejudice to Petitioner because it was the product of a person who suffered from a serious conflict of interest. Pugach, who had already been disbarred, intentionally submitted a defective brief that failed to raise the single most critical challenge to Petitioner's conviction; that her trial attorney had operated under an actual and unwaivable conflict of interest. Pugach made sure not to submit a document that zealously raised this constitutional claim so that the Pugach Document would not be so vigorous as to trigger a hearing requiring his appearance in court, and

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(Cont'd)

the Fifth or Fourteenth Amendments — not the Sixth Amendment — in *state* post-conviction proceedings because "respondent's access to a lawyer is the result of the State's decision, not the command of the United States Constitution." *Id. at* 556; *see also Hernandez v. Greiner*, 305 F. Supp. 2d 216, 224-25 (E.D.N.Y. 2004) (discussing the limited applicability of *Finley).* Indeed, a recent Supreme Court case has rejected "the general rule that claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice." *Massaro v. United States*, 538 U.S. 500, 505 (2003). *Massaro* held that even where the petitioner retained new counsel for direct appeal, the ineffective assistance claim still could be raised on collateral review rather than at the direct appeal because it would conserve judicial resources. *Id.* at 506-07. One commentator has stated that following the logic of *Massaro*, "the post-conviction trial court should be analogized to the initial trial court and not to the first appeal as of right." Donald A. Dripps, *Ineffective Litigation of Ineffective Assistance Claims: Some Uncomfortable Reflections on Massaro v. United States*, 42 Brandeis L.J. 793, 801 (2004). Professor Dripps then contends that the *Massaro* principle suggests that "the defendant should be afforded a right to appointed counsel on collateral review, since it is the appeal from the denial of a post-conviction petition that constitutes, practically speaking, first appeal from the rejection of an ineffective-assistance claim." *Id.* at 801; *see also id.* at 802-03.

thereby calling the government's attention to the fact that he was a disbarred convicted felon engaged in the unauthorized practice of law. One could certainly appreciate how, "inadequate credentials provide an incentive for lackluster representation, because an attorney will be concerned about drawing attention to himself and encouraging an inquiry into his background." *United States v. Maria-Martinez*, 143 F.3d 914, 917 (5th Cir. 1998) (citing *Solina v. United States*, 709 F.2d 160, 164 (2d Cir. 1983)). In fact, the Fifth Circuit actually dismissed the appeal from the Pugach Document for want of prosecution, because Pugach failed to timely file a brief on Petitioner's behalf. Of course, Petitioner had no idea a brief was due, as she had retained and paid Pugach to handle her appeal and to keep track of such things.

In any event, regardless of how the argument is styled, its thrust is unmistakable: Pugach should not legally be deemed an authorized agent of Petitioner and his filing should be deemed a nullity. The District Court and the Fifth Circuit failed to consider this *independent* basis for granting Petitioner relief. Moreover, because Petitioner raised this fraudulent agency argument as soon as the claim became ripe, her current § 2255 motion should not be treated as "second or successive" under an abuse of the writ standard.

As the statement of facts in both the current § 2255 motion and the Balcazar Opposition Brief make plain, what happened here is that Pugach did *not* truly represent Petitioner. He misrepresented his qualifications as a lawyer and induced her to hire him as such. He caused her to enter into an agency agreement based upon false pretenses, and thus the "§ 2255 motion" he filed cannot be legally recognized as a filing made on Petitioner's behalf for § 2255 purposes.

For purposes herein, it is not disputed that Petitioner was denied effective assistance during her trial and direct appeal by her criminal defense attorney, Vela. The question is whether the putative and wholly defective document filed by Pugach is one for which Petitioner must be held responsible. Basic concepts of fairness dictate that Petitioner be given a chance to submit one § 2255 motion that is truly filed on behalf of her interest and hers only. When the opportunity first arose for Petitioner to collaterally attack the result of the initial proceedings, she was fraudulently induced to engage someone who purported to be a duly admitted attorney. Moreover, not only did Pugach fail to disclose to Petitioner that he was a disbarred convicted felon, he actually concealed it; this concealment caused him to file Petitioner's appeal on a *pro se* basis the ramifications of which he did not explain to her, so as to minimize his own exposure.

All Petitioner asks is the opportunity to have *one and only one* submission that is solely made in her best interest, and as the Fifth Circuit held in *Lacaze v. United States*, 457 F.2d 1075, 1081-82 (5th Cir. 1972), the object is "to restore the unsuccessful Appellant to the point — but no further — where he was when he lost his direct appeal in the Court of Appeals and his counsel did nothing toward advising him of certiorari rights or an effective assertion of them." In *Lyles v. United States*, 346 F.2d 789, 791-92 (5th Cir. 1965), a case relied on by *Lacaze*, the Fifth Circuit held that if defendant is "affirmatively misled . . . into missing the opportunity to appeal" then the defendant's "right to appeal [would be] so frustrated as to entitle him to relief under 2255," *even though* the defendant had filed two previous § 2255 petitions. In *Lyles*, the affirmative misrepresentation alleged by the defendant was that his "court-appointed counsel failed to advise the petitioner of his right to file Notice of Appeal *in forma pauperis*," where any alternative route to appeal would

be too costly for the indigent defendant. *Id.* at 791. The Fifth Circuit thus emphasized the fundamental importance of ensuring that the indigent defendant fully comprehends the options available to him and the decisions purportedly being made on his behalf, as well as the importance of affording to the indigent defendant an opportunity for a fair review of the record leading to his conviction.[15]

When Pugach induced Petitioner to engage him as her lawyer, her legal agent for purposes of the § 2255 process, he relied on lies to do so. He held himself out as a duly admitted attorney for the purpose of obtaining Ms. Balcazar's engagement and legal fees, when in fact he had been disbarred, investigated for engaging in the unauthorized practice of law and convicted of a felony for having hired hit men to facially deform his mistress with acid .[16] Pugach did not inform Ms. Balcazar of these facts.

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[15] *Doyle v. United States*, 366 F.2d 394 (9th Cir. 1966) (after attorney advised against appeal and told client he not could appeal *in forma pauperis*, defendant's right to appeal was frustrated); *United States v. Kwan*, No. 03-50315, 2005 U.S. App. LEXIS 14806, (9th Cir. 2005) ("where, as here, counsel has not merely failed to inform, but has effectively misled, his client about the immigration consequences of a conviction, counsel's performance is objectively unreasonable under contemporary standards for attorney competence.") (citing *United States v. Couto*, 311 F.3d 179, 199 (2d Cir. 2002) (same)); *United States v. Reyes*, No. CRIM. 98-301-01, 1999 WL 239099, at *4 n.12 (E.D. Pa. Mar. 26, 1999) ("a defendant who has been seriously misled about sentencing exposure may have an ineffective assistance of counsel claim, but only in fairly egregious situations where the defendant was either affirmatively misled by counsel or never told of a plea bargain offered from the prosecution that would have resulted in a much reduced sentence") (citations omitted); *see also United States v. Williams*, 894 F.2d 215, 217 (7th Cir. 1990) ("counsel misled this court as to his perusal of the record and incorrect affirmed that 'nothing' in it supports an appeal," warranting sanctions under court's supervisory powers).

[16] Moreover, Petitioner had no reason to know or to question

(Cont'd)

Moreover, because of the serious implications of the no-second-petition rule, the Supreme Court recently underscored the importance of courts clearly advising *pro se* defendants of the perils in this regard. In *Castro v. United States*, 540 U.S. 375, 383 (2003), the Supreme Court prohibited District Courts from using their supervisory powers to recharacterize pleadings as § 2255 motions to vacate without first informing *pro se* litigants that recharacterization would mean that any subsequent § 2255 pleading the defendant might file would be subject to "second or successive" restriction, and explaining the significance thereof. Thus, Courts applying *Castro* have invoked their supervisory powers to look beyond the defendant's own characterization of a pleading in both directions, i.e., those improperly characterized as § 2255 petitions and those that should be characterized as § 2255 petitions. *See generally In re Wagner*, 421 F.3d 275, 278 (3d Cir. 2005) (defendant not required to first seek Court of Appeals permission to file new § 2255 petition despite having filed previous petitions purportedly under § 2255); *see also In re Shelton*, 295 F.3d 620, 622 (6th Cir. 2002) (same).

We respectfully submit that it would do violence to *Castro's* underlying rationale if Petitioner were held responsible for the fraudulent and defective filing of the Pugach Document. Far from taking affirmative steps to warn a *pro se* petitioner of the consequences of filing any document that could be construed as a § 2255 motion, this Court would be holding Petitioner responsible for a filing for which she cannot legally be held responsible.

(Cont'd)

Pugach's status as an attorney, because she met him during her incarceration at MCI, when, to her knowledge, MCI permitted an attorney to enter the premises to assist prisoners with their appeals. To Petitioner's knowledge, Pugach also represented himself to MCI as an attorney.

In light of this Court's strong cautionary warning to lower courts to carefully ascertain whether a motion should be treated as second or successive for purposes of § 2255, Petitioner respectfully asserts that the District Court and the Fifth Circuit decisions are in direct conflict with this Court's precedent requiring careful analysis of the grounds upon which a motion is deemed to be second or successive. In the instant case, the District Court and the 5th Circuit, to Petitioner's severe detriment, completely failed to acknowledge, let alone, analyze Petitioner's "fraudulent agency" claim.

Thus, for the foregoing reasons, Petitioner respectfully asserts that the Pugach Document be deemed null and void and that Petitioner's current § 2255 motion be considered her "first" filing. To hold otherwise, would produce "far reaching and seemingly perverse" results by forever precluding Petitioner from asserting a newly ripened claim based on fraud and from finally bringing to light all the many injustices perpetrated upon her. First, by Vela, representing her at trial and on appeal, who served under an actual conflict of interest in violation of her Sixth Amendment right to conflict-free counsel and second by Pugach, a disbarred attorney, who entered a federal penitentiary under false pretenses and fraudulently induced Petitioner to file a grossly defective document which, to her severe detriment, is being treated as a first filing for purposes of § 2255.

3. A fraud upon the Court was perpetrated herein, causing a breakdown in the integrity and fundamental fairness of the judicial system, such that this Court's general power to supervise the administration of justice in federal courts is invoked, thereby providing a compelling reason for a Writ of Certiorari to be granted.

All courts have the inherent equitable power to vacate a judgment that has been obtained through the commission of fraud upon the court. *Universal Oil Prods. Co. v. Root Ref.*

Co., 328 U.S. 575, 580 (1946). Cognizant of this power, Petitioner also recognizes that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991).

Almost all of the principles that govern a claim of fraud on the court find their genesis in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) (hereinafter *"Hazel-Atlas"*). In *Hazel-Atlas*, an attorney for Hartford and an officer of the court, had deliberately set out to mislead the court by having an article published in a trade journal praising a Hartford product as an advance in the field under the name of an ostensibly disinterested expert. *Id.* at 240. The Patent Office and the Third Circuit relied in part on this article in ruling in favor of Hartford in patent application and patent infringement cases. *Id.* at 240-41. This Court found conclusive evidence that this article was used for fraudulent purposes, and in granting relief to Hazel-Atlas explained that "[f]rom the beginning there has existed . . . a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry." *Id.* at 244. This Court further noted that "[h]ere, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." *Id.* at 245-46.

Moreover, the final savings clause of the Federal Rules of Civil Procedure Rule 60(b) specifically provides for the continuing existence of this equitable power outside and independent of that rule.[17] *See generally* Charles Alan Wright

[17] The provision of Rule 60(b) commonly known as the "savings clause" states: "This rule does not limit the power of a court to (Cont'd)

et al., *Federal Practice and Procedure* § 2870 (2d ed. 1995). There is no statute of limitations for bringing a fraud upon the court claim. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944). As a circuit court has explained, "a decision produced by fraud on the court is not in essence a decision at all and never becomes final." *Kenner v. Comm'r of Internal Revenue*, 387 F.2d 689, 691 (7th Cir. 1968).

Petitioner recognizes that a fraud upon the court action must satisfy a very demanding standard to justify upsetting the finality of a challenged judgment. However, Petitioner respectfully asserts that based on the facts herein there was an intentional fraud by Pugach, which was directed at the court itself[18] and which in fact deceived the lower courts (as

(Cont'd)

entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. The fraud upon the court described in the savings clause is distinct from the fraud described in Rule 60(b)(3), the latter of which allows a court to relieve a party of a judgment upon the showing of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." Rule 60(b)(3) is subject to a one-year period of limitation.

[18] Petitioner asserts that the fraud was intentionally directed at the District Court itself based on the essential distinction between the concepts of procedural and substantive conduct. Procedural conduct has been viewed as any conduct directly related to the management of a suit in accordance with a court's rule of procedure. See 2F. Mechem, A Treatise on the Law of Agency § 2160 (2d ed. 1914). For example, procedural conduct would include conduct that is directed toward the court, such as appearing at hearings and drafting and filing pleadings, whereas substantive conduct would include conduct directed towards the client, such as the decision to bring suit. In light of this distinction, in the instant case, the drafting and filing of the Pugach Document, (styled as a *pro se* motion) was an intentional fraudulent act directed at the Court itself.

well as the federal penitentiary). *Hazel-Atlas*, 322 U.S. at 386-86.

Given the facts herein, *Hazel-Atlas* is directly on point, as Pugach's actions are analogous to those of the attorney in *Hazel-Atlas*. In *Hazel-Atlas*, the attorney deliberately set out to mislead the Patent Office and the Third Circuit by publishing an article under the guise of a disinterested expert. Similarly, Pugach deliberately set out to mislead the federal penitentiary, the District Court and the Fifth Circuit by having the Pugach Document "published" (by being filed under Petitioner's name,) under the guise of being a *pro se* filing, even though Petitioner was not the author of such document, in order to conceal the fact that he was disbarred and engaging in the unauthorized practice of law. Pugach, burdened by the conflict of one who is fearful of being found out, acted with the intent to deceive the court in filing the Pugach Document on a *pro se* basis, so as to minimize his own exposure. This most egregious misconduct which is supported by clear, unequivocal and convincing evidence was a deliberately planned and carefully executed scheme to defraud not only Petitioner and the federal penitentiary (where Pugach met Petitioner under the guise of being a licensed attorney), but was directed to the court itself.

Further, as this Court indicated in *Hazel-Atlas*, the fact that Petitioner failed to ask Pugach or MCI (since the penitentiary allowed him to enter the premises) to substantiate his credentials or otherwise uncover the fraud until it was discovered by counsel herein is not material, as "tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Hazel-Atlas*, 322 U.S. at 246.

Accordingly, given the compelling and unusual facts herein, the acquiescence by the District Court and Fifth Circuit of the Pugach Document caused a breakdown in the integrity and fundamental fairness of the judicial system, such that this Court's general power to supervise the administration of justice in federal courts is invoked, thereby providing a compelling reason for a Writ of Certiorari to be granted herein.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED FEBRUARY 13, 2007

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-20271
USDC No. 4:05-CV-1653
USDC No. 4:89-CR-12-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MIRYAM BALCAZAR,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

ORDER:

Miryam Balcazar, federal prisoner # 48375-079, moves for a certificate of appealability (COA) to appeal from the district court's dismissal of her 28 U.S.C. § 2255 motion as successive and unauthorized. Balcazar challenges her conviction of conspiracy to possess with intent to distribute cocaine and possession with intent to distribute cocaine. Balcazar contends that her 1994 § 2255 motion was a nullity

because the disbarred attorney whom she alleges prepared it misrepresented himself by claiming to be a practicing attorney and that, therefore, her 2005 § 2255 motion was not successive to the 1994 motion.

A COA may be issued only if Balcazar has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When a § 2255 motion is dismissed on procedural grounds, a COA will issue only if the movant "shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Balcazar has not made the showing required to obtain a COA.

COA DENIED.

s/ Edith Brown Clement
EDITH BROWN CLEMENT
UNITED STATES CIRCUIT JUDGE

APPENDIX B — ORDER AND FINAL JUDGMENT ADOPTING RECOMMENDATION OF THE MAGISTRATE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED JANUARY 23, 2006

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL ACTION NO. H-89-12
CIVIL ACTION NO. H-05-1653

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

MIRYAM BALCAZAR,

Defendant-Movant.

ORDER ADOPTING RECOMMENDATION OF THE MAGISTRATE JUDGE

Pending is the Government's Answer and Motion to Dismiss (Document No. 201) and Movant Miryam Balcazar's 28 U.S.C. § 2255 Motion to Vacate, Set Aside or Correct Sentence (Document No. 195). The Court has received from the Magistrate Judge a Memorandum and Recommendation recommending that the Government's Motion to Dismiss be GRANTED, and that Balcazar's Motion to Vacate, Set Aside or Correct Sentence be DISMISSED WITHOUT

PREJUDICE as a successive § 2255 proceeding for which no authorization to file has been received. Movant filed Objections to the Memorandum and Recommendation (Document No. 209). The Court, after having made a *de novo* determination of the Government's Motion to Dismiss, Balcazar's § 2255 Motion to Vacate, Set Aside or Correct Sentence, the Magistrate Judge's Memorandum and Recommendation, and Balcazar's Objections, is of the opinion that the findings and recommendations of the Magistrate Judge are correct and should be and hereby are accepted by the Court in their entirety.

Accordingly,

It is ORDERED and ADJUDGED for the reasons set forth in the Memorandum and Recommendation of the United States Magistrate Judge signed on October 26, 2005, and entered on October 28, 2005, which is adopted in its entirety as the opinion of this Court, that the Government's Motion to Dismiss (Document No. 201) is GRANTED, and Movant Miryam Balcazar's § 2255 Motion to Vacate, Set Aside or Correct Sentence (Document No. 195) is DISMISSED WITHOUT PREJUDICE. It is further

ORDERED that a certificate of appealability is DENIED. A certificate of appealability from a habeas corpus proceeding will not issue unless the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate

to deserve encouragement to proceed further." *Slack v. McDaniel*, 120 S. Ct. 1595, 1603-1604 (2000) (internal quotations and citations omitted). Stated differently, where the claims have been dismissed on the merits, the petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 1604; *Beasley v. Johnson*, 242 F.3d 248, 263 (5th Cir.), *cert. denied*, 122 S.Ct. 329 (2001). When the claims have been dismissed on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 120 S. Ct. at 1604. A district court may deny a certificate of appealability *sua sponte*, without requiring further briefing or argument. *Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000).

Given the dismissal without prejudice of Defendant/ Movant's successive § 2255 motion, Defendant/Movant has not made a substantial showing of the denial of a constitutional right. Thus, a certificate of appealability is DENIED.

The Clerk will enter this Order and send copies to all parties of record.

Signed at Houston, Texas this 21st day of January, 2006.

s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL ACTION NO. H-89-12
CIVIL ACTION NO. H-05-1653

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

MIRYAM BALCAZAR,

Defendant-Movant.

FINAL JUDGMENT

It is ORDERED and ADJUDGED for the reasons set forth in this Court's separate Order Adopting Recommendation of the Magistrate Judge, and the Memorandum and Recommendation of the Magistrate Judge signed on October 26, 2005, and entered on October 28, 2005, which Memorandum is adopted in its entirety as the opinion of this Court, that the Government's Motion to Dismiss (Document No. 201) is GRANTED, and Movant Miryam Balcazar's § 2255 Motion to Vacate, Set Aside or Correct Sentence (Document No. 132) is DISMISSED WITHOUT PREJUDICE as a successive § 2255 proceeding for which no authorization to file has been received. It is further

Appendix B

ORDERED that a Certificate of Appealability is DENIED. THIS IS A FINAL JUDGMENT.

The Clerk will enter this Order and send copies to all parties of record.

SIGNED at Houston, Texas, this 21st day of January, 2006.

s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C — MEMORANDUM AND RECOMMENDATION GRANTING THE GOVERNMENT'S MOTION TO DISMISS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED OCTOBER 28, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL ACTION NO. H-89-12
CIVIL ACTION NO. H-05-1653

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

MIRYAM BALCAZAR,

Defendant-Petitioner.

MEMORANDUM AND RECOMMENDATION GRANTING THE GOVERNMENT'S MOTION TO DISMISS

Before the Magistrate Judge is Petitioner Miryam Balcazar's § 2255 Motion to Vacate, Set Aside or Correct Sentence (Document No. 195), and the United States' Answer and Motion to Dismiss (Document No. 201). After having reviewed the Government's motion, Balcazar's response

Appendix C

(Document No. 203), Balcazar's previous § 2255 motion (Document No. 137), and the claims raised herein, the Magistrate Judge RECOMMENDS, for the reasons set forth below, that the Government's Motion to Dismiss be GRANTED, that Balcazar's § 2255 motion be DENIED, and that this § 2255 proceeding be DISMISSED WITHOUT PREJUDICE.

Balcazar was charged in 1989 with conspiracy to possess with intent to distribute cocaine (count one), possession with intent to distribute cocaine (count two), and money laundering (count three). (Document No. 1). She was found guilty on all counts by the District Court following a bench trial. (Document No. 60). Thereafter, she was sentenced to 300 months confinement, to be followed by a five year term of supervised release, and a $5000 fine. (Document No. 79). Judgment was signed on June 28, 1989. (Document No. 83). Balcazar's conviction was affirmed on appeal in an unpublished opinion entered on May 27, 1993. (Document Nos. 133 & 134). Balcazar did not file a petition for writ of certiorari.

On July 8, 1994, Balcazar filed a "Motion for Relief under 28 U.S.C. 2255", in which she raised two claims: (1) that the District Court should have been disqualified and her bench trial was not fair given the District Court's prior denial of her motion to suppress; and (2) that her trial counsel was ineffective for allowing the District Court to preside over both the suppression hearing and the bench trial. (Document No. 137). The motion was denied by the District Court on July 20, 1994 (Document Nos. 139 & 140). Balcazar appealed that ruling to the Fifth Circuit, which affirmed the District

Appendix C

Court's denial of her § 2255 motion in an unpublished opinion entered on February 7, 1996. (Document No. 146). Balcazar's petition for writ of certiorari was thereafter denied. (Document No. 147).

Years later, on May 6, 2005, Balcazar filed her second § 2255 Motion to Vacate, Set Aside or Correct Sentence. (Document No. 195). In that second § 2255 Motion, Balcazar alleges that: (1) her trial counsel had an actual conflict of interest; (2) that her trial counsel was ineffective for failing to negotiate a plea agreement, giving her faulty advice regarding the waiver of her right to a jury trial, failing to move for the recusal or disqualification of the District Judge, failing to file a motion to reduce her sentence, failing to file a motion for new trial, and failing to raise meritorious issues on appeal; and (3) that the attorney who assisted her with her prior § 2255 motion was ineffective. The Government moves for dismissal on the basis that Balcazar has not obtained Fifth Circuit permission to file a second or successive § 2255 motion. In response to the Motion to Dismiss, Balcazar argues that this, her second § 2255 motion, should be considered her first § 2255 motion because she was defrauded by the attorney who filed her first § 2255 motion in 1994.[1]

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1. In her response to the Motion to Dismiss, Balcazar argues:

> Ms. Balcazar raises a claim that was not and could not have been brought in her prior petition, because it was not available to her at the time she filed her prior § 2255 motion. Her purported attorney, Burton Pugach ("Mr. Pugach"), who prepared the prior motion styled

(Cont'd)

Appendix C

Pursuant to 28 U.S.C. § 2255,

> [a] second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> > (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
> >
> > (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable.

Section 2244(b)(3)(A), in turn, provides, "*[b]efore* a second or successive application permitted by this section *is filed in the district court*, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to

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(Cont'd)

> as a § 2255 motion on her behalf, was disbarred and was operating under an actual, unwaivable conflict of interest, in violation of Ms. Balcazar's right to conflict-free counsel. As a consequence, Ms. Balcazar's prior motion styled as a § 2255 motion cannot be deemed a prior petition.

(Document No. 203) at 1-2.

consider the application." (emphasis added). Both § 2255 and § 2244(b)(3)(A) contemplate that a § 2255 movant seek certification from the Fifth Circuit Court of Appeals for the filing of a second or successive § 2255 motion before the motion is actually filed in the District Court. *See In re Tatum*, 233 F.3d 857, 858 (5th Cir. 2000) ("Before a successive 28 U.S.C. § 2255 motion may be filed in district court, the movant must obtain authorization from this court for the district court to consider the movant's successive § 2255 motion. 28 U.S.C. §§ 2244(b)(3)(A). § 2255."); *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) ("§ 2244(b)(3)(A) acts as a jurisdictional bar to the district court's asserting jurisdiction over any successive habeas petition until this court has granted the petitioner permission to file one"); *United States v. Rich*, 141 F.3d 550, 553 (5th Cir. 1998) (upholding dismissal of § 2255 motion where movant had not sought or acquired certification from the Fifth Circuit to file a second or successive § 2255 motion), *cert. denied*, 526 U.S. 1011 (1999).[2] Because there is nothing in the record to indicate that Balcazar sought and received the appropriate certification from the Fifth Circuit Court of Appeals prior to filing the instant § 2255 motion, or that since the filing of

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2. The certification requirement of § 2255 and § 2244(b)(3)(A), which is part of the AEDPA amendments, applies regardless of whether a movant's initial § 2255 motion was pending before or after April 24, 1996, the effective date of the AEDPA. *See Graham v. Johnson*, 168 F.3d 762, 782-83 (5th Cir. 1999) ("Substituting the court of appeals for the district court as the gatekeeper against abusive or procedurally defaulted claims would seem to raise no retroactivity concerns. A litigant has no reasonable expectation that a particular tribunal will adjudicate his claims."), *cert. denied*, 529 U.S. 1097 (2000).

the motion she has obtained the necessary certification, the District Court is without jurisdiction to entertain this § 2255 proceeding. Although Balcazar argues that there are extraordinary circumstances, including the fraud by the attorney who filed her first § 2255 motion, which warrant consideration of this § 2255 proceeding as though it were her first § 2255 motion, there is no case law or statutory authority which would allow this second § 2255 proceeding to be considered as anything but a second § 2255 motion. If there are to be circumstances which would (or should) warrant the consideration Balcazar seeks of her second § 2255 motion, a determination of such must be made by either a higher court or Congress. Moreover, to the extent Balcazar argues that this § 2255 proceeding should not be considered a second or successive § 2255 proceeding because she raises a claim herein — that the attorney who prepared the prior § 2255 motion was ineffective — that was not and could not have been raised in the prior § 2255 motion, such an argument fails as a matter of law. It is well settled that a defendant has no constitutional right to the effective assistance of counsel in a post-conviction collateral proceeding such as this. *See Pennsylvania v. Finley*, 481 U.S. 551, 555-556 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, *see Johnson v. Avery*, 393 U.S. 483, 488, 89 S.Ct. 747, 750, 21 L.Ed.2d 718 (1969), and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further."); *see also Sanchez v. United States*, 50 F.3d 1448, 1456 (9th Cir. 1995) (because there is no Sixth Amendment right to counsel in a post-conviction collateral proceeding, a petitioner cannot "assert a claim for ineffective assistance

of counsel"); *Harper v. United States*, 666 F.Supp. 902, 907 (N.D. Miss. 1987) ("As a general rule, prisoners have no constitutional right to counsel, or effective assistance of counsel, when mounting a collateral attack to their convictions.").

Therefore, because Balcazar's current § 2255 motion (Document No. 195) is undoubtedly a second or successive motion, and because Balcazar has not received permission from the Fifth Circuit Court of Appeals to file a second § 2255 Motion, the Magistrate Judge

RECOMMENDS that the Government's Motion to Dismiss (Document No. 201) be GRANTED, that Balcazar's § 2255 Motion to Vacate, Set Aside or Correct Sentence (Document No. 195) be DENIED, and that this § 2255 proceeding be DISMISSED WITHOUT PREJUDICE.

The Clerk shall file this instrument and provide a copy to all counsel and unrepresented parties of record. Within 10 days after being served with a copy, any party may file written objections pursuant to 28 U.S.C. § 636(b)(1)(C), FED. R. CIV. P. 72(b), and General Order 80-5, S.D. Texas. Failure to file objections within such period shall bar an aggrieved party from attacking factual findings on appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Ware v. King*, 694 F.2d 89 (5th Cir. 1982), *cert. denied*, 461 U.S. 930 (1983); *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (en banc). Moreover, absent plain error, failure to file objections within the ten day period bars an aggrieved party from attacking conclusions of law on appeal. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1429 (5th Cir. 1996).

Appendix C

The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208.

Signed at Houston, Texas, this 20th day of October, 2005.

s/ Frances H. Stacy
FRANCES H. STACY
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — STATUTES AND RULES INVOLVED

Federal Statutes

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render

the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

Appendix D

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant

shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

Rules

Federal Rules of Civil Procedure Rule 60. Relief from Judgment or Order

(a) Clerical Mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time

to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 14, 2007

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-20271

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MIRYAM BALCAZAR

Defendant - Appellant

Appeal from the United States District Court for the Southern District of Texas, Houston

Before JOLLY, DENNIS, and CLEMENT, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motion for certificate of appealability. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is denied.

APPENDIX F — OPINION OF THE COURT OF APPEALS OF NEW YORK DECIDED JULY 2, 1968

COURT OF APPEALS OF NEW YORK

22 N.Y.2d 579

LINDA RISS,

Appellant,

v.

CITY OF NEW YORK,

Respondent.

Argued February 27, 1968
Decided July 2, 1968

BREITEL, Judge.

This appeal presents, in a very sympathetic framework, the issue of the liability of a municipality for failure to provide special protection to a member of the public who was repeatedly threatened with personal harm and eventually suffered dire personal injuries for lack of such protection. The facts are amply described in the dissenting opinion and no useful purpose would be served by repetition. The issue arises upon the affirmance by a divided Appellate Division of a dismissal of the complaint, after both sides had rested but before submission to the jury.

It is necessary immediately to distinguish those liabilities attendant upon governmental activities which have displaced

or supplemented traditionally private enterprises, such as are involved in the operation of rapid transit systems, hospitals, and places of public assembly. Once sovereign immunity was abolished by statute the extension of liability on ordinary principles of tort law logically followed. To be equally distinguished are certain activities of government which provide services and facilities for the use of the public, such as highways, public buildings and the like, in the performance of which the municipality or the State may be liable under ordinary principles of tort law. The ground for liability is the provision of the services or facilities for the direct use by members of the public.

In contrast, this case involves the provision of a governmental service to protect the public generally from external hazards and particularly to control the activities of criminal wrongdoers. (See, e.g., *Messineo v. City of Amsterdam*, 17 N Y 2d 523; *Motyka v. City of Amsterdam*, 15 N Y 2d 134, 138- 139; *Steitz v. City of Beacon*, 295 N. Y. 51, 56; 18 McQuillin, Municipal Corporations [3d ed.], §§ 53.79-53.80.) The amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards, could and would inevitably determine how the limited police resources of the community should be allocated and without predictable limits. This is quite different from the predictable allocation of resources and liabilities when public hospitals, rapid transit systems, or even highways are provided.

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Before such extension of responsibilities should be dictated by the indirect imposition of tort liabilities, there should be a legislative determination that that should be the scope of public responsibility (Van Alystyne, Governmental Tort Liability, 10 U. C. L. A. L. Rev. 463, 467; Note, 60 Mich. L. Rev. 379, 382).

It is notable that the removal of sovereign immunity for tort liability was accomplished after legislative enactment and not by any judicial arrogation of power (Court of Claims Act, §8). It is equally notable that for many years, since as far back as 1909 in this State, there was by statute municipal liability for losses sustained as a result of riot (General Municipal Law, § 71). Yet even this class of liability has for some years been suspended by legislative action (New York State Defense Emergency Act [L. 1951, ch. 784, § 113, subd. 3; § 121, as last amd. by L. 1968, ch. 115]), a factor of considerable significance.

When one considers the greatly increased amount of crime committed throughout the cities, but especially in certain portions of them, with a repetitive and predictable pattern, it is easy to see the consequences of fixing municipal liability upon a showing of probable need for and request for protection. To be sure these are grave problems at the present time, exciting high priority activity on the part of the national, State and local governments, to which the answers are neither simple, known, or presently within reasonable controls. To foist a presumed cure for these problems by judicial innovation of a new kind of liability in tort would be foolhardy indeed and an assumption of judicial wisdom and power not possessed by the courts.

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Nor is the analysis progressed by the analogy to compensation for losses sustained. It is instructive that the Crime Victims Compensation and "Good Samaritan" statutes, compensating limited classes of victims of crime, were enacted only after the most careful study of conditions and the impact of such a scheme upon governmental operations and the public fisc (Executive Law, art. 22, § 620 et. seq. [L. 1966, ch. 894]; Administrative Code of City of New York, ch. 3, tit. A, § 67-3.2). And then the limitations were particular and narrow.

For all of these reasons, there is no warrant in judicial tradition or in the proper allocation of the powers of government for the courts, in the absence of legislation, to carve out an area of tort liability for police protection to members of the public. Quite distinguishable, of course, is the situation where the police authorities undertake responsibilities to particular members of the public and expose them, without adequate protection, to the risks which then materialize into actual losses (*Schuster v. City of New York*, 5 N Y 2d 75).

Accordingly, the order of the Appellate Division affirming the judgment of dismissal should be affirmed.

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KEATING, Judge (dissenting).

Certainly, the record in this case, sound legal analysis, relevant policy considerations and even precedent cannot account for or sustain the result which the majority have here reached. For the result is premised upon a legal rule which long ago should have been abandoned, having lost any justification it might once have had. Despite almost universal condemnation by legal scholars, the rule survives, finding its continuing strength, not in its power to persuade, but in its ability to arouse unwarranted judicial fears of the consequences of overturning it.

Linda Riss, an attractive young woman, was for more than six months terrorized by a rejected suitor well known to the courts of this State, one Burton Pugach. This miscreant, masquerading as a respectable attorney, repeatedly threatened to have Linda killed or maimed if she did not yield to him: "If I can't have you, no one else will have you, and when I get through with you, no one else will want you". In fear for her life, she went to those charged by law with the duty of preserving and safeguarding the lives of the citizens and residents of this State. Linda's repeated and almost pathetic pleas for aid were received with little more than indifference. Whatever help she was given was not commensurate with the identifiable danger. On June 14, 1959 Linda became engaged to another man. At a party held to celebrate the event, she received a phone call warning her that it was her "last chance". Completely distraught, she called the police, begging for help, but was refused. The next day Pugach carried out his dire threats in the very manner he had foretold by having a hired thug throw lye in Linda's face. Linda was

blinded in one eye, lost a good portion of her vision in the other, and her face was permanently scarred. After the assault the authorities concluded that there was some basis for Linda's fears, and for the next three and one-half years, she was given around-the-clock protection.

No one questions the proposition that the first duty of government is to assure its citizens the opportunity to live in personal security. And no one who reads the record of Linda's ordeal can reach a conclusion other than that the City of New York, acting through its agents, completely and negligently failed to fulfill this obligation to Linda.

Linda has turned to the courts of this State for redress, asking that the city be held liable in damages for its negligent failure to protect her from harm. With compelling logic, she can point out that, if a stranger, who had absolutely no obligation to aid her, had offered her assistance, and thereafter Burton Pugach was able to injure her as a result of the negligence of the volunteer, the courts would certainly require him to pay damages. (Restatement, 2d, Torts, § 323.) Why then should the city, whose duties are imposed by law and include the prevention of crime (New York City Charter, § 435) and, consequently, extend far beyond that of the Good Samaritan, not be responsible? If a private detective acts carelessly, no one would deny that a jury could find such conduct unacceptable. Why then is the city not required to live up to at least the same minimal standards of professional competence which would be demanded of a private detective?

Linda's reasoning seems so eminently sensible that surely it must come as a shock to her and to every citizen to hear

the city argue and to learn that this court decides that the city has no duty to provide police protection to any given individual. What makes the city's position particularly difficult to understand is that, in conformity to the dictates of the law, Linda did not carry any weapon for self-defense (former Penal Law, §1897). Thus, by a rather bitter irony she was required to rely for protection on the City of New York which now denies all responsibility to her.

It is not a distortion to summarize the essence of the city's case here in the following language: "Because we owe a duty to everybody, we owe it to nobody." Were it not for the fact that this position has been hallowed by much ancient and revered precedent, we would surely dismiss it as preposterous. To say that there is no duty is, of course, to start with the conclusion. The question is whether or not there should be liability for the negligent failure to provide adequate police protection.

The foremost justification repeatedly urged for the existing rule is the claim that the State and the municipalities will be exposed to limitless liability. The city invokes the specter of a "crushing burden" (*Steitz v. City of Beacon*, 295 N. Y. 51, 55) if we should depart from the existing rule and enunciate even the limited proposition that the State and its municipalities can be held liable for the negligent acts of their police employees in executing whatever police services they do in fact provide (cf. dissenting opn. per Desmond, J., in *Steitz v. City of Beacon*, supra, p. 57; dissenting opn. per Beldock, J., in *Schuster v. City of New York*, 286 App. Div. 389, 391).

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The fear of financial disaster is a myth. The same argument was made a generation ago in opposition to proposals that the State waive its defense of "sovereign immunity". The prophecy proved false then, and it would now. The supposed astronomical financial burden does not and would not exist. No municipality has gone bankrupt because it has had to respond in damages when a policeman causes injury through carelessly driving a police car or in the thousands of other situations where, by judicial fiat or legislative enactment, the State and its subdivisions have been held liable for the tortious conduct of their employees. Thus, in the past four or five years, New York City has been presented with an average of some 10,000 claims each year. The figure would sound ominous except for the fact the city has been paying out less than $8,000,000 on tort claims each year and this amount includes all those sidewalk defect and snow and ice cases about which the courts fret so often. (Reports submitted by the Comptroller of the City of New York to the Comptroller of the State of New York pursuant to General Municipal Law, §50-f.) Court delay has reduced the figure paid somewhat, but not substantially. Certainly this is a slight burden in a budget of more than six billion dollars (less than two tenths of 1%) and of no importance as compared to the injustice of permitting unredressed wrongs to continue to go unrepaired. That Linda Riss should be asked to bear the loss, which should properly fall on the city if we assume, as we must, in the present posture of the case, that her injuries resulted from the city's failure to provide sufficient police to protect Linda is contrary to the most elementary notions of justice.

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The statement in the majority opinion that there are no predictable limits to the potential liability for failure to provide adequate police protection as compared to other areas of municipal liability is, of course, untenable. When immunity in other areas of governmental activity was removed, the same lack of predictable limits existed. Yet, disaster did not ensue.

Another variation of the "crushing burden" argument is the contention that, every time a crime is committed, the city will be sued and the claim will be made that it resulted from inadequate police protection. Here, again, is an attempt to arouse the "anxiety of the courts about new theories of liability which may have a far-reaching effect". (*Spiegler v. City of New Rochelle*, 39 Misc 2d 720, 723, affd. on opn. below 19 A D 2d 751, mot. for lv. to app. den. 13 N Y 2d 600.) And here too the underlying assumption of the argument is fallacious because it assumes that a strict liability standard is to be imposed and that the courts would prove completely unable to apply general principles of tort liability in a reasonable fashion in the context of actions arising from the negligent acts of police and fire personnel. The argument is also made as if there were no such legal principles as fault, proximate cause or forseeability, all of which operate to keep liability within reasonable bounds. No one is contending that the police must be at the scene of every potential crime or must provide a personal bodyguard to every person who walks into a police station and claims to have been threatened. They need only act as a reasonable man would under the circumstances. At first there would be a duty to inquire. If the inquiry indicates nothing to substantiate the alleged threat, the matter may be put aside and other matters attended to. If,

however, the claims prove to have some basis, appropriate steps would be necessary.

The instant case provides an excellent illustration of the limits which the courts can draw. No one would claim that, under the facts here, the police were negligent when they did not give Linda protection after her first calls or visits to the police station in February of 1959. The preliminary investigation was sufficient. If Linda had been attacked at this point, clearly there would be no liability here. When, however, as time went on and it was established that Linda was a reputable person, that other verifiable attempts to injure her or intimidate her had taken place, that other witnesses were available to support her claim that her life was being threatened, something more was required — either by way of further investigation or protection — than the statement that was made by one detective to Linda that she would have to be hurt before the police could do anything for her.

In dismissing the complaint, the trial court noted that there are many crimes being committed daily and the police force is inadequate to deal with its "tremendous responsibilities". The point is not addressed to the facts of this case. Even if it were, however, a distinction must be made. It may be quite reasonable to say that the City of New York is not required to hire sufficient police to protect every piece of property threatened during mass riots. The possibility of riots may even be foreseeable, but the occurrence is sufficiently uncommon that the city should not be required to bear the cost of having a redundancy of men for normal operations. But it is going beyond the bounds of required judicial moderation if the city is permitted to escape liability

in a situation such as the one at bar. If the police force of the City of New York is so understaffed that it is unable to cope with the everyday problem posed by the relatively few cases where single, known individuals threaten the lives of other persons, then indeed we have reached the danger line and the lives of all of us are in peril. If the police department is in such a deplorable state that the city, because of insufficient manpower, is truly unable to protect persons in Linda Riss' position, then liability not only should, but must be imposed. It will act as an effective inducement for public officials to provide at least a minimally adequate number of police. If local officials are not willing to meet even such a low standard, I see no reason for the courts to abet such irresponsibility.

It is also contended that liability for inadequate police protection will make the courts the arbiters of decisions taken by the Police Commissioner in allocating his manpower and his resources. We are not dealing here with a situation where the injury or loss occurred as a result of a conscious choice of policy made by those exercising high administrative responsibility after a complete and thorough deliberation of various alternatives. There was no major policy decision taken by the Police Commissioner to disregard Linda Riss' appeal for help because there was absolutely no manpower available to deal with Pugach. This "garden variety" negligence case arose in the course of "day-by-day operations of government" (*Weiss v. Fote*, 7 N Y 2d 579, 585). Linda Riss' tragedy resulted not from high policy or inadequate manpower, but plain negligence on the part of persons with whom Linda dealt. (See *Lubelfeld v. City of New York*, 4 N Y 2d 455; Prosser, Torts [3d ed.], pp. 999-1001; Peck, Federal Tort Claims — Discretionary Function, 31 Wash. L. Rev. 207.)

More significant, however, is the fundamental flaw in the reasoning behind the argument alleging judicial interference. It is a complete oversimplification of the problem of municipal tort liability. What it ignores is the fact that indirectly courts are reviewing administrative practices in almost every tort case against the State or a municipality, including even decisions of the Police Commissioner. Every time a municipal hospital is held liable for malpractice resulting from inadequate recordkeeping, the courts are in effect making a determination that the municipality should have hired or assigned more clerical help or more competent help to medical records or should have done something to improve its record-keeping procedures so that the particular injury would not have occurred. Every time a municipality is held liable for a defective sidewalk, it is as if the courts are saying that more money and resources should have been allocated to sidewalk repair, instead of to other public services.

The situation is nowise different in the case of police protection. Whatever effects there may be on police administration will be one of degree, not kind. In *McCrink v. City of New York* (296 N. Y. 99) we held the city liable where a drunken policeman, while off duty, shot and killed a citizen in an unprovoked assault. The policeman had a long history of being a troublemaker, having been brought up before the Police Commissioner on drunkenness charges on three prior occasions. In imposing liability on the city, were we not in effect overruling the Commissioner's judgment in retaining the policeman on the force and saying his decision was so unreasonable that the city should be required to pay damages? (See, also, *Meistinsky v. City of New York*, 309 N. Y. 998.)

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The truth of the matter, however, is that the courts are not making policy decisions for public officials. In all these municipal negligence cases, the courts are doing two things. First, they apply the principles of vicarious liability to the operations of government. Courts would not insulate the city from liability for the ordinary negligence of members of the highway department. There is no basis for treating the members of the police department differently.

Second, and most important, to the extent that the injury results from the failure to allocate sufficient funds and resources to meet a minimum standard of public administration, public officials are presented with two alternatives: either improve public administration or accept the cost of compensating injured persons. Thus, if we were to hold the city liable here for the negligence of the police, courts would no more be interfering with the operations of the police department than they "meddle" in the affairs of the highway department when they hold the municipality liable for personal injuries resulting from defective sidewalks, or a private employer for the negligence of his employees. In other words, all the courts do in these municipal negligence cases is require officials to weigh the consequences of their decisions. If Linda Riss' injury resulted from the failure of the city to pay sufficient salaries to attract qualified and sufficient personnel, the full cost of that choice should become acknowledged in the same way as it has in other areas of municipal tort liability. Perhaps officials will find it less costly to choose the alternative of paying damages than changing their existing practices. That may be well and good, but the price for the refusal to provide for an adequate police force should not be borne by Linda Riss and all the other innocent victims of such decisions.

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What has existed until now is that the City of New York and other municipalities have been able to engage in a sort of false bookkeeping in which the real costs of inadequate or incompetent police protection have been hidden by charging the expenditures to the individuals who have sustained often catastrophic losses rather than to the community where it belongs, because the latter had the power to prevent the losses.

Although in modern times the compensatory nature of tort law has generally been the one most emphasized, one of its most important functions has been and is its normative aspect. It sets forth standards of conduct which ought to be followed. The penalty for failing to do so is to pay pecuniary damages. At one time the government was completely immunized from this salutary control. This is much less so now, and the imposition of liability has had healthy side effects. In many areas, it has resulted in the adoption of better and more considered procedures just as workmen's compensation resulted in improved industrial safety practices. To visit liability upon the city here will no doubt have similar constructive effects. No "presumed cure" for the problem of crime is being "foisted" upon the city as the majority opinion charges. The methods of dealing with the problem of crime are left completely to the city's discretion. All that the courts can do is make sure that the costs of the city's and its employees' mistakes are placed where they properly belong. Thus, every reason used to sustain the rule that there is no duty to offer police protection to any individual turns out on close analysis to be of little substance.

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The city properly cites *Motyka v. City of Amsterdam* (15 N Y 2d 134), *Steitz* (supra) and other cases in support of its position. But what is of importance here are cases such as *Bernardine* (infra), *Meistinsky* (supra), *Runkel* (infra) and *Schuster* (infra), for these cases signify the direction in which the law is proceeding. They indicate how, step by step, New York courts are moving to return* — albeit with some notable setbacks — toward the day when the government, in carrying out its various functions, will be held equally responsible for the negligent acts of its employees as would a private employer. *Bernardine v. City of New York* (294 N. Y. 361), one of the earliest cases, is cited generally for the proposition that the State's waiver of "sovereign immunity" is applicable to its subdivisions. What is of greater interest about the case is that it premised liability on pure common-law negligence. But although "sovereign immunity", by that name, supposedly died in *Bernardine v. City of New York*, it has been revived in a new form. It now goes by the name — "public duty".

Thus, in *Steitz v. City of Beacon* (295 N. Y. 51), relying on *Moch Co. v. Rensselaer Water Co.* (247 N. Y. 160), a pre-waiver case, the old rule was revived under a new guise that the duty to furnish police and fire protection runs to the general public and not to any individual. Yet in *Runkel v. Homelsky* (286 App. Div. 1101, affd. 3 N Y 2d 857), we held the city liable for failure to order the removal of a vacant building where a city inspector had actual notice that the building was in imminent danger of collapse but did nothing.

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* Originally, the doctrine of "sovereign immunity" was categorically rejected in New York. Lloyd, Municipal Tort Liability in New York, 23 N. Y. U. L. Rev. 278, 279-281.

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(See, also, *Runkel v. City of New York*, 282 App. Div. 173.) Logically, there was nothing left to *Seitz* after *Runkel*. Nevertheless, again in *Motyka v. City of Amsterdam* (15 N Y 2d 134, supra), in a case involving the failure to enforce a fire safety regulation, we again retreated and held that "liability arises out of a statute only in limited instances where disregard of the command of the statute results in damage to one of the class for whose special benefit the statute was enacted." (Id., p. 139.) (See, also, *Messineo v. City of Amsterdam*, 17 N Y 2d 523.)

In *Infosino v. City of New York* (25 A D 2d 841, mot. for lv. to app. den. *sub nom. Carroll v. City of New York*, 18 N Y 2d 583), liability was again denied, but in that case there was no negligence involved since there was no notice to the city of the violation of the provisions of the Administrative Code. In addition, there was a serious question of proximate cause in the case. To deny liability on ordinary principles of tort law offers a far better approach to the question of municipal tort liability than the fiction that there is no duty running to the general public.

The majority opinion would explain the result here as involving the protection of the public from an "external hazard." This attempt to reconcile the case law does not withstand analysis. Is not a blizzard or snowstorm an "external hazard"? Analytically, the problems of providing adequate police protection and snow removal are indistinguishable.

Fortunately, this court has avoided the misfeasance-nonfeasance doctrine (*Runkel v. Homelsky, supra*; *McCrink*

v. City of New York, supra; *Schuster v. City of New York*, 5 N Y 2d 75, 82) which is still another untenable attempt to limit the consequences of the State's waiver of liability. As Chief Judge Desmond pointed out so often, the broad language of the waiver of "sovereign immunity" in the Court of Claims Act (§ 8) should have been sufficient to cover the police and fire protection cases. (See, e.g., *Steitz v. City of Beacon*, 295 N. Y., supra, pp. 58-59.) Therefore, the majority opinion's call for legislative action is answered by the fact that it has already occurred. The statute makes no exception for cases arising in the area of police and fire protection and no satisfactory explanation as to why section 8 of the Court of Claims Act is not applicable here is offered anywhere in the majority opinion. There are lower court cases holding the municipality might be held liable for the failure of the police to protect a person, where they had actual notice of a probable assault. (*Isereau v. Stone*, 207 Misc. 941, revd. on other grounds 3 A D 2d 243; *Canosa v. City of Mt. Vernon*, N. Y. L. J., Feb. 18, 1965, p. 17, col. 6.)

Some indication of the movement of the law against the existing rule can be extracted from the fact that, whereas a few decades ago, the rule that there is no duty to provide adequate police and fire protection was attacked only intermittently, in recent years more and more insistently we have been asked to reject the rule. An assault can be found now in almost every recent volume of the New York Reports, but never before has the question "been presented in so stark a manner as in the case before us" (Fuld, Ch. J., in *Babcock v. Jackson*, 12 N Y 2d 473, 484).

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The rule is Judge made and can be judicially modified. By statute, the judicially created doctrine of "sovereign immunity" was destroyed. It was an unrighteous doctrine, carrying as it did the connotation that the government is above the law. Likewise, the law should be purged of all new evasions, which seek to avoid the full implications of the repeal of sovereign immunity.

No doubt in the future we shall have to draw limitations just as we have done in the area of private litigation, and no doubt some of these limitations will be unique to municipal liability because the problems will not have any counterpart in private tort law. But if the lines are to be drawn, let them be delineated on candid considerations of policy and fairness and not on the fictions or relics of the doctrine of "sovereign immunity". Before reaching such questions, however, we must resolve the fundamental issue raised here and recognize that, having undertaken to provide professional police and fire protection, municipalities cannot escape liability for damages caused by their failure to do even a minimally adequate job of it.

The Appellate Division did not adopt the "no duty" theory, but said there was no negligence here because the danger was not imminent. Despite the fact that the majority of the Appellate Division "agree[d] that certain rulings, and particularly the manner in which they were made, did not add to the appearance of a fair trial", and which, in fact, resulted in a wholly inadequate hearing, the majority found that the "facts brought out on this trial do not show the presence of such imminent danger that extraordinary police activity was so indicated that the failure to take it can be

deemed unreasonable conduct." This finding does not stand examination and to its credit the city does not argue that this record would not support a finding of negligence. The danger to Linda was indeed imminent, and this fact could easily have been confirmed had there been competent police work.

Moreover, since this is an appeal from a dismissal of the complaint, we must give the plaintiff the benefit of every favorable inference. The Appellate Division's conclusion could only have been reached by ignoring the thrust of the plaintiff's claim and the evidence in the record. A few examples of the actions of the police should suffice to show the true state of the record. Linda Riss received a telephone call from a person who warned Linda that Pugach was arranging to have her beaten up. A detective learned the identity of the caller. He offered to arrest the caller, but plaintiff rejected that suggestion for the obvious reason that the informant was trying to help Linda. When Linda requested that Pugach be arrested, the detective said he could not do that because she had not yet been hurt. The statement was not so. It was and is a crime to conspire to injure someone. True there was no basis to arrest Pugach then, but that was only because the necessary leg work had not been done. No one went to speak to the informant, who might have furnished additional leads. Linda claimed to be receiving telephone calls almost every day. These calls could have been monitored for a few days to obtain evidence against Pugach. Any number of reasonable alternatives presented themselves. A case against Pugach could have been developed which would have at least put him away for awhile or altered the situation entirely. But, if necessary, some police protection should have been afforded.

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Perhaps, on a fuller record after a true trial on the merits, the city's position will not appear so damaging as it does now. But with actual notice of danger and ample opportunity to confirm and take reasonable remedial steps, a jury could find that the persons involved acted unreasonably and negligently. Linda Riss is entitled to have a jury determine the issue of the city's liability. This right should not be terminated by the adoption of a question-begging conclusion that there is no duty owed to her. The order of the Appellate Division should be reversed and a new trial granted.

Chief Judge Fuld and Judges Burke, Scileppi, Bergan and Jasen concur with Judge Breitel; Judge Keating dissents and votes to reverse in a separate opinion.

Order affirmed, without costs.

APPENDIX G — OPINION OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT DATED DECEMBER 15, 1960

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 15th day of December, 1960.

Present—

Hon.	BERNARD BOTEIN,	Presiding Justice
"	CHARLES D. BREITEL,	)
"	BENJAMIN J. RABIN,	)
"	FRANCIS L. VALENTE,	) Justices
"	JAMES B.M. McNALLY,	)

IN THE MATTER

of

BURTON N. PUGACH,

An Attorney.

The Bronx County Bar Association, by Stanley N. Ohlbaum, Esq., its attorney, having presented to this Court on the 1st day of December, 1960, a petition alleging that the above-named respondent, Burton N. Pugach, who was admitted to practice as an attorney and counselor-at-law in the State of New York, on the 21st day of June, 1950, at a term of the Appellate Division of the Supreme Court, First Judicial Department, was convicted in the County Court, Bronx County, on November 9, 1960, of a violation of Section 1897, subdivision 5-a of the Penal Law of the State of New York, and having petitioned the Court for an order striking

the name of said respondent from the roll of attorneys pursuant to subdivision 4 of Section 90 of the Judiciary Law of the State of New York; and the respondent having appeared herein in person and made a cross-motion to dismiss the said petition, and for an assignment of counsel to represent him in these proceedings,

Now, upon reading the petition of The Bronx County Bar Association, verified the 13th day of July, 1960, the exhibits annexed thereto, the affidavit of Stanley N. Ohlbaum, Esq., annexed thereto, sworn to the 17th day of November, 1960, the notice of presentation of said petition, dated the 17th day of November, 1960, with proof of due service thereof upon the respondent; the notice of cross-motion, dated November 19, 1960, with proof of due service thereof, the unsworn affidavit of Burton N. Pugach in support of the cross-motion, and the affidavit of Stanley N. Ohlbaum, sworn to November 28, 1960; in opposition to the cross-motion, and after hearing Mr. Stanley N. Ohlbaum for the motion and in opposition to the cross-motion, and Burton N. Pugach, respondent pro se, in opposition to the motion and in support of the cross-motion, and due deliberation having been had thereon, and it appearing that the respondent, Burton N. Pugach, was convicted in the County Court, Bronx County, on November 9, 1960 of a violation of Section 1897, subdivision 5-a of the Penal Law of the State of New York, a felony, and upon such conviction ceased to be an attorney and counselor-at-law, it is hereby unanimously

Ordered that the cross-motion to dismiss the petition and for an assignment of counsel be and the same hereby is denied, and it is further unanimously

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Ordered that the name of the said Burton N. Pugach be struck from the roll of attorneys and counselors-at-law in the State of New York; and it is further unanimously

Ordered that the said Burton N. Pugach be and he hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk or employee of another, from the date of entry of this order; and it is further unanimously

Ordered that the said Burton N. Pugach be and he hereby is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, from the date of entry of this order; and it is further unanimously

Ordered that the said Burton N. Pugach be and he hereby is forbidden to give to another an opinion as to the law or its application or any advice in relation thereto from the date of entry of this order.

ENTER:

s/ Vincent [illegible]
Clerk.

APPENDIX H — OPINION OF THE SUPREME COURT OF NEW YORK, APPELLATE TERM, SECOND DEPARTMENT DATED FEBRUARY 8, 1999

NEW YORK SUPREME COURT APPELLATE TERM, SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

BURTON N. PUGACH,

Appellant.

Feb. 8, 1999

PRESENT: KASSOFF, P.J., ARONIN and CHETTA, JJ.

MEMORANDUM

Judgment of conviction unanimously affirmed.

Defendant is charged with harassing his former lover. The information alleged that defendant had engaged in a course of conduct or repeatedly committed acts which alarmed or seriously annoyed the victim. Specifically, the victim received a telephone call from the defendant on October 8, 1996, wherein defendant stated: "I hope we are not going to war, I hope no one gets hurt, I am no longer passive." When the victim informed defendant that all she wanted was to be happy, defendant replied, "Is Linda happy?"

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(In 1962 defendant was convicted of burglary, maiming and assault for the 1959 hiring of three men to throw lye into the face of Linda Riis, whom he later married). Defendant further stated to the victim that: "It's 1959 all over again."

The accusatory instrument further alleges that a second telephone call was received from the defendant on October 10, 1996, wherein defendant stated: "You never ceased to be rude to me, you are a whore." A third telephone call was received on October 15, 1996, wherein defendant asked the victim to dinner, and when she refused, defendant stated: "If I can't have you no one else can." After the last telephone call, the victim went to defendant's office where defendant stated: "Since you do not want to have dinner with me, tonight will be your last dinner. I have tremendous connections, I will meet with my people tomorrow, and I will not even know who did it." Defendant further stated: "I do not want to go to jail, I will not blind you because you will be on the **870 stand with your big mouth, it will be quick. I will pay for your funeral, I am well liked, and have millions, I am not afraid of the police. I will cancel the order to kill you if you have dinner and sex with me, you know my background."

Defendant first argues that the information is jurisdictionally defective, mandating dismissal, because the instrument fails to set forth the elements of the offense charged.

Penal Law § 240.26[3] states:

> "A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person * * *

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> He or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other persons and which serve no legitimate purpose."

The information clearly tracks the language of the above statute, and indicates that defendant undertook a course of conduct during an eight day period wherein defendant made statements to the victim "with intent to harass, annoy, threaten, or alarm" which "did cause the victim annoyance and alarm." Thus, the information contains the necessary elements of the offense.

Defendant also seeks to dismiss the information upon a claim that there was no probable cause for his arrest. Assuming arguendo that defendant's arrest was without probable cause, an illegal arrest without more does not bar a prosecution nor is it a defense to an otherwise valid conviction (*People v. Young*, 55 N.Y.2d 419, 449 N.Y.S.2d 701, 434 N.E.2d 1068). Simply, a defendant cannot suppress his presence at trial upon a claim that there was no basis for his arrest (*id.*).

Next, defendant argues that the evidence adduced at trial was insufficient to support the verdict.

Viewing the evidence in a light most favorable to the People (*People v. Contes*, 60 N.Y.2d 620, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find it was legally sufficient to establish defendant's guilt beyond a reasonable doubt. Moreover, since all issues of credibility and the weight to be accorded to the evidence adduced at trial are questions to be determined by

the trier of facts, the jury's determination should not be disturbed, as the record amply supports its findings (*People v. Gaimari*, 176 N.Y. 84, 68 N.E. 112). Thus, upon the exercise of this court's power of factual review, we are satisfied that the verdict was not against the weight of the credible evidence (*see, id.*; *see also*, CPL 470.15[5]).

Finally, defendant's contention that the court erred in not charging the jury that character testimony alone is sufficient to create a reasonable doubt is completely without merit. It is well settled law that evidence of defendant's good character, standing alone, is not sufficient to constitute a reasonable doubt as to guilt (*People v. Aharonowicz*, 71 N.Y.2d 678, 529 N.Y.S.2d 736, 525 N.E.2d 458).

APPENDIX I — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED AND FILED AUGUST 22, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 01-CV-1330 (DGT)

BURTON N. PUGACH,

Plaintiff,

- against -

FIRST DEPARTMENT DISCIPLINARY COMMITTEE and HON. RICHARD A. BROWN, District Attorney for Queens County

Defendants.

TRAGER, District Judge:

Pro se plaintiff Burton Pugach ("Pugach") sued for injunctive relief, the First Departmental Disciplinary Committee ("DDC") and the Honorable Richard Brown, District Attorney of Queens County ("Brown"), (1) alleging 42 U.S.C. §1983 violations arising from: (a) a lack of due process in his 1960 disbarment proceedings; and (b) defendant Brown's interference with plaintiff's right to earn a livelihood; and (2) alleging a violation of 18 U.S.C. §1030 - which criminalizes and also makes civilly actionable fraud and related activity in connection with computers -

arising from defendant Brown's obtaining information from plaintiff's banking records.

Pending determination of the §1983 claims relating to the disbarment proceedings, Pugach seeks a preliminary injunction (1) staying defendants from enforcing the allegedly void disbarment order; (2) staying defendants from interfering with his right to work as a paralegal; and (3) enjoining the alleged continuing §1030 violation. Defendant DDC moves to dismiss, contending that Pugach's claims are barred by the Eleventh Amendment, the *Rooker-Feldman* doctrine, and the statute of limitations, and further alleging that the complaint fails to state a cause of action against the DDC. Defendant Brown also moves to dismiss, contending that Pugach's claims regarding the order of disbarment are barred by the Eleventh Amendment, the *Rooker-Feldman* doctrine and the statute of limitations. Defendant Brown further contends that this Court should abstain from exercising jurisdiction over the plaintiff's §1030 claims.

Background

Pugach, an attorney, was indicted in 1960 on the charge of felonious possession of a firearm. He was separately charged with, and later convicted of, burglary and maiming in connection with a related matter. Pugach was disbarred in December 1960 following conviction of the firearm possession charge. (*See Pl.'s Mem. Law* at 2.) Pugach was incarcerated at the time of the disbarment decision. *Id.* He was represented by counsel for each of these proceedings, although he has since questioned the competence of each of

his lawyers. *Id.* at 2-4. Since his 1974 release from prison, Pugach has worked as a paralegal and has been semi-retired since 1994. *Id.* at 12.

In 1996-97, plaintiff was arrested and tried in Queens County for various offenses, including harassment, menacing, and violating an order of protection. *Id.* at 5-7. Defendant Brown was the Queens County District Attorney supervising the case. *Id.*

Pugach contends that he has recently become the subject of investigation by defendant Brown, involving Pugach's alleged unlawful practice of law without a license. *Id.* at 7-8. As part of the alleged investigation, Brown and his subordinates have apparently accessed checking information from Pugach's Citibank account ("Citibank Account"), and have, contacted a number of individuals and organizations from whom Pugach has recently received checks. *Id.* No criminal prosecution of Pugach relating to the investigation is currently pending.

Defendant Brown's recent investigation into the alleged unlawful practice of law appears to have reminded Pugach of his formerly authorized practices as an attorney prior to the 1960 disbarment. Accordingly, on or about March 6, 2001, Pugach commenced a §1983 civil rights action in this Court to enjoin enforcement of the allegedly void 1960 disbarment order. Pugach also seeks a stay of defendant Brown's use of information derived from the Citibank Account. Pugach requests that the investigation be enjoined, pending determination of the §1983 claims.

Appendix I

Discussion

(1)

Pugach seeks a preliminary injunction against defendants DDC and Brown barring enforcement of the 1960 disbarment order. He contends that the disbarment order was obtained in violation of his right to due process, and in violation of a federal court order. Both DDC and Brown move to dismiss.

Pugach contends that the disbarment order was entered in violation of his right to due process under §1983. (*Pl.'s Mem. Law* at 1.) Specifically, Pugach asserts that he was disbarred without a hearing after conviction of illegal possession of a loaded firearm, a crime that he contends was then a misdemeanor. *Id.* at 9-10. He contends that he was unable to defend himself because he was incarcerated and represented by inadequate counsel, and otherwise would have successfully pointed out DDC's error in instituting automatic disbarment proceedings. *See Id.*, at 9. Pugach correctly points out that following conviction of a misdemeanor, an attorney is not automatically disbarred absent evidence of moral turpitude. NY JUD §90(935) (McKinney's 1983). Regardless, the published record indicates that the crime for which Pugach was convicted was a felony at the time of his conviction.[1] *See In the Matter of Burton N. Pugach*, 12

1. Pugach was indicted under Penal Law Section 1897-a Subdivision 5-a, in effect in October 1959, which reads in relevant part: "Subdivision 5-a prohibits having or carrying concealed upon the person any pistol, revolver or other firearm which is loaded with ammunition at the time . . . without a license. Violation of this subdivision is a felony" *Recited in People v. Ray*, 212 N.Y.S.2d 166, 167 (Ct. Spec. Sess. 1961).

A.D.2d 73, 74 (1st Dep't 1960) (finding that Pugach was indicted and charged with a felony).

Pugach apparently further alleges that his March 3, 1960 trial for illegal possession of a firearm, and consequently, the disbarment decision resulting therefrom, was in violation of the Second Circuit's February 1, 1960 stay that temporarily enjoined the State of New York from using wiretap evidence obtained in connection with the firearm, maiming, and burglary charges. *Pugach v. Dollinger*, 275 F.2d 503, 507 (2d Cir. February 1, 1960). However, the stay was vacated in *Pugach v. Dollinger*, 277 F.2d 739 (2d Cir. April 14, 1960), temporarily reinstated when the Supreme Court granted certiorari, and ultimately removed when the U.S. Supreme Court affirmed the original District Court decision denying plaintiff's request to suppress the wiretap evidence. *Pugach v. Dollinger*, 365 U.S. 458, 81 S. Ct. 650 (February 27, 1961) (affirming 277 F. 2d 739, which affirmed the District Court decision reported in *Pugach v. Sullivan*, 180 F. Supp. 66). The wiretap evidence was later found admissible by the New York Court of Appeals following Pugach's trial on the maiming and burglary charges. *People v. Pugach*, 16 N.Y.2d 504 (1965), *rehearing denied*, 20 N.Y.2d 758 (1967), *appeal dismissed, sub nom., Pugach v. New York*, 383 U.S. 575, 86 S. Ct. 1077 (1966).

Pugach alleges that the March 3, 1960 felony firearm possession trial itself violated the February 1, 1960 temporary stay. (*Pl.'s Mem. in Opp'n to Defs,' Mot. to Dismiss* at 2.) However, the Second Circuit decision did not stay plaintiff's trial; rather, the stay applied only to the introduction of wiretap evidence. *See Pugach*, 275 F.2d at 507

("[D]efendants and their agents and employees are hereby enjoined and restrained from using and disclosing wiretap evidence at the trial of Pugach"). The March 3, 1960 trial was not in violation of the temporary stay because Pugach's firearm conviction was not based on the wiretap evidence. *People v. Pugach*, 15 N.Y.2d 65, 67-68 (1964), *cert. denied*, 380 U.S. 936, 85 S. Ct. 946 (1965).

Accordingly, defendants' enforcement of the 1960 disbarment order is not in violation of a federal order, as plaintiff contends. Plaintiff has failed to offer anything other than broad, conclusory statements as to the defectiveness of the disbarment decision. Pugach has not demonstrated that he was indicted for a misdemeanor on the firearm charge, as he claims. As supported by the published record, Pugach's disbarment was based on conviction of a felony, in accordance with New York procedure. NY JUD §90(931) (McKinney's 1983). His claim that the underlying firearm conviction was based on illegally obtained evidence is also without merit. The conviction was fully litigated and upheld on appeal in the earlier criminal proceedings. Moreover, even if this court could hear a challenge to Pugach's disbarment - which there is reason to think it cannot, *see, e.g., Sassower v. Mangano*, 927 F.Supp. 113, 119 (S.D.N.Y. 1996) (attorney aggrieved by state court decision in attorney disciplinary proceeding must pursue his claims challenging that decision directly in the state appellate courts and ultimately to the U.S. Supreme Court); *but see* discussion of *Rooker-Feldman* doctrine in footnote 2 *infra*, in order to bring a challenge to his disbarment under §1983, Pugach would still have to show that his conviction has been invalidated, which it has not been. *See Heck v. Humphrey*, 512 U.S. 477, 489-90, 114 S.Ct.

2364, 2374 (1994) ("Just as a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor, so also a §1983 cause of action . . . attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated"). For all of these reasons, defendants' motions to dismiss is granted.[2]

(2)

Pugach also seeks a preliminary injunction against defendant Brown's accessing the Citibank Account, and a stay preventing defendants from using any information derived therefrom. Defendant DDC moves to dismiss on the grounds that plaintiff has failed to allege sufficient facts upon which relief can be granted. DDC is not involved in Brown's

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2. Defendants DDC and Brown also move to dismiss based on the three-year statute of limitations for Civil Rights Actions and the *Rooker-Feldman* doctrine, *see Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S. Ct. 149, 150 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-84 and n. 16, 103 S. Ct. 1303- 1314-1316 (1983). Plaintiff responds to the statute of limitations ground by alleging that disbarment is a continuous tort. He further alleges that despite the published account of the disbarment, *In the Matter of Burton N. Pugach*, 12 A.D.2d 73 (1960), he was never personally served notice of the disbarment order, in order to start the running of the statute of limitations. (*Pl.'s Mem. in Opp'n to Defs.' Mot. to Dismiss* at 9-10.) Pugach also contends that the *Rooker-Feldman* doctrine is inapplicable because he did not have a full hearing related to the disbarment proceedings. Although defendants' statute of limitations and *Rooker-Feldman* arguments appear meritorious, in light of the above discussion, these grounds are not considered.

investigation. As such, DDC's motion to dismiss is granted, because Pugach has failed to state facts sufficient to support a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Defendant Brown moves to dismiss on the grounds that this Court should abstain from interfering with the investigation, and that plaintiff is estopped from raising claims related to the 1996-97 arrest and trial.

Pugach contends that Brown's investigation is a deliberate effort to interfere with his right to earn a livelihood as a paralegal, and he will thereby suffer irreparable harm. Pugach contends that the investigation interferes with his right to work as a semi-retired paralegal by disrupting his remaining business and scaring away his clientele. He also alleges that Brown's investigation is in retaliation for Pugach's acquittal at the 1996-97 trial.

Pugach further alleges that defendant Brown's investigation, through access of the Citibank Account, violates §1030 and, therefore, his Fourth, Fifth, and Sixth Amendment rights. Specifically, Pugach contends that Brown's instructions to access the Citibank Records constituted unauthorized access in violation of §1030(a)(2), which prohibits unauthorized access of a computer to obtain "information contained in a financial record of a financial institution." He sues under the authority of §1030(g), which provides that "[a]ny person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator." Section 1030(f) specifically excepts "any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency."

Appendix I

Pugach must establish (1) irreparable harm and (2) likelihood of success on the merits in order to be granted injunctive relief. *Plaza Health Lab., Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989). However, Pugach has failed to show either irreparable harm or a likelihood of success on the merits of the §1030 claims against Brown.

First, Pugach has not shown that the investigation has in any way disrupted his business. In fact; Pugach has asserted only that his current clients are unwilling to assist in Brown's investigation. (*See Pl.'s Mem. Law* at 18.) Further, loss of employment does not in and of itself justify the extraordinary measure of injunctive relief. *See Sampson v. Murray*, 415 U.S. 61, 89-92, 94 S. Ct. 937, 952-54 (1974); *Ahmad v. Long Island Univ.*, 18 F. Supp. 2d 245, 248 (E.D.N.Y. 1998) (noting that employment termination does not constitute irreparable injury absent other "compelling circumstances"). Pugach has not demonstrated that defendant Brown's current investigation has prevented or is preventing him from working as a semi-retired paralegal, or has deprived him of his Constitutional right to gainful employment. Accordingly, Pugach has failed to show irreparable harm.

Pugach has also failed to show that defendant Brown's access of the Citibank Account was either "without authorization" or "exceed[ed] authorized access" under §1030(a)(2)(A). Pugach contends that Congress has not authorized what he alleges to be unfettered intrusion by a law enforcement agency, without judicial supervision. (*Pl.'s Mem. Law* at 18). While Pugach acknowledges that lawfully authorized access by a law enforcement agency is explicitly excepted under Section 1030(f), he contends that

such lawful authorization requires a search warrant, or some other court-issued order. However, Pugach's interpretation mistakenly implies that an alleged violation of §1030 by a law enforcement agency constitutes an illegal search and seizure. Section 1030(g) merely permits a cause of action against a violator for fraudulent access of a computer. Charges of fraud against a law enforcement agency are authorized under §1030(f) only where the investigation itself is not lawfully authorized. So long as the investigation is lawfully authorized, §1030(f) does not discriminate among the various means a law enforcement agency may use to investigate. Accordingly, Pugach has failed to show a likelihood of success on the merits.

Finally, principles of federalism weigh against federal intervention into an ongoing state criminal investigation. *See Alvarez v. City of New York*, 2 F. Supp. 2d 509, 516 (S.D.N.Y. 1998) (declining to interfere with city police department's internal investigation). Recognizing the drastic measure of federal intervention in a pending state prosecution, the Supreme Court has determined that federal abstention is mandatory "except under special circumstances." *Younger v. Harris*, 401 U.S. 37, 41, 91 S. Ct. 756, 749 (1971). Pugach's request for injunctive relief does not fall squarely within the *Younger* holding because he is not the subject of a pending state prosecution. *Id.*; *see also Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931, 95 S. Ct. 2561, 2567 (1975) (finding federal abstention not required under *Younger* where no state criminal prosecution is pending). Nevertheless, the Supreme Court has since clarified that "the salient factor was not the label given the contempt proceedings but the federal court's undue interference." *Juidice v. Vail*, 430 U.S. 327, 335-36, 97 S. Ct. 1211, 1217 (1977). The Second Circuit has determined

that *Younger* abstention is appropriate where there is an ongoing state criminal proceeding; an important state interest is implicated; and the plaintiff has an avenue open for review of constitutional claims in the state court, as these factors are consistent with the principles of comity, federalism, and equity expressed in *Younger*. *See, CECOS Int'l Inc. v. Jorling*, 895 F.2d 66, 70 (2d Cir. 1990).

The first prong of the test requires an analysis of whether, for the purposes of *Younger* abstention, a District Attorney's investigation constitutes an "ongoing state criminal proceeding" prior to arrest or indictment of the individual under investigation. In considering a similar inquiry, a relatively recent Southern District case relied on both the statutory definition of "criminal proceeding" and, importantly, the policy underlying *Younger*. *Nick v. Abrams*, 717 F. Supp. 1053 (S.D.N.Y. 1989).

In *Nick*, the plaintiff had been the subject of an investigation related to criminal state tax claims, and later sued the New York State Attorney General in federal court, alleging that documents related to the investigation had been seized under an overly broad search warrant, which constituted an illegal search and seizure, and seeking a preliminary injunction directing the Attorney General to return the seized materials. *Id.* at 1055. In considering whether abstention was appropriate, the court questioned "whether a 'pending state proceeding' exists when a state attorney general executes a search warrant authorized by a judge during a criminal investigation prior to arrest or indictment." *Id.* at 1056.

Appendix 1

The *Nick* Court was guided in its decision, in part, by New York's statutory language, which provides that under New York law, a "criminal proceeding" is "any proceeding which (a) constitutes a part of a criminal action or (b) occurs in a criminal court and is related to a prospective, pending or completed criminal action, . . . or involves a criminal investigation." N.Y. Crim. Proc. Law §1.20(18) (McKinney's 1992). A "criminal action," in turn, "commences with the filing of an accusatory instrument against a defendant in a criminal court." *Id.* at §1.20(16). In this case, no accusatory instrument, i.e., no indictment, had been issued. There was, thus, no "criminal action" as defined in §1.20(18)(a). However, the *Nick* court found that the search warrant fell within §1.20(18)(b), since it "occur[red] in a criminal court," insofar as it was issued by a judge, and "involve[d] a criminal investigation." *Nick*, 717 F. Supp. at 1056. Accordingly, the court concluded that New York's definition of a "criminal proceeding" was satisfied.

But, in the case at bar, although a criminal investigation is in progress, there is nothing in the record about anything in connection with this investigation that occurred in a criminal court. Thus, under New York's definition of a criminal proceeding, no criminal proceeding exists here. Accordingly, a careless reader of the *Nick* opinion might conclude that *Younger* abstention would not apply under these circumstances. This assumes, however, that the Supreme Court's *Younger* abstention jurisprudence, premised as it is on broad and universally applicable federalism concerns, should be definitively guided by varying definitions of "criminal proceedings" within each of the fifty states, some of which may, indeed, not have any statutory definition of the specific term "criminal proceedings."

There is no reason to believe this to be the case, and the *Nick* court wisely expanded its holding beyond the scope of New York's formal statutory definition of a "criminal proceeding," writing that "common sense dictates that a criminal investigation is an integral part of a criminal proceeding." *Id.* Prosecutors must be able to obtain the evidence required to begin a criminal action against a suspected offender. *See id.* Accordingly, "[p]ermitting to targets of state criminal investigations to challenge [authorized searches] prior to their indictment or arrest . . . would do as much damage to principles of equity, comity, and federalism as allowing federal courts to suppress the fruits of subpoenas or search warrants in ongoing state criminal trials." *Id.* For precisely these reasons, the investigation of Pugach's alleged unlawful practice of law must also be viewed as part of an "ongoing state criminal proceeding." Under the rationale of *Younger*, this Court does not have the authority under these circumstances to restrain a lawfully authorized state official from exercising his duties.

Indeed, even prior to *Younger*, the Supreme Court consistently held that state officials should not be enjoined from enforcing state criminal statutes, unless failing to intervene would result in irreparable injury to the plaintiff's constitutional rights. *See, e.g., Cameron v. Johnson*, 381 U.S. 741, 746, 85 S. Ct. 1751, 1754 (1965) ("In the absence of some such extraordinary situation, however, this Court has uniformly held that federal courts should refrain from interfering with enforcement of state criminal laws."); *Douglas v. City of Jeannette*, 319 U.S. 157, 163, 63 S. Ct. 877, 881 (1943) ("[C]ourts of equity in the exercise of their discretionary powers should conform to [the policy of

abstention] by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases"); *Watson v. Buck*, 313 U.S. 387, 400, 61 S. Ct. 962, 966 (1941) ("A general statement that an officer stands ready to perform his duty falls far short of such a threat as would warrant the intervention of equity."); *Speilman Motor Sales Co. v. Dodge*, 295 U.S. 89, 95, 55 S. Ct. 678, 680 (1935) ("To justify such interference [with enforcing a criminal statute] there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights."). The *Younger* court itself noted that the abstention mandate conformed with a "longstanding public policy against federal court interference." *Younger*, 401 U.S. at 43, 91 S. Ct. at 750. In particular, where the constitutionality of the underlying statute is not in question, the federal court should refrain from intervening. *See Douglas*, 319 U.S. at 162, 63 S. Ct. at 881; *cf. Doran*, 422 U.S. at 930, 95 S. Ct. at 2567 (finding that district court's grant of injunction against enforcement of contested ordinance did not constitute abuse of discretion where constitutionality of ordinance had been challenged prior to plaintiffs' prosecution thereunder).

Finally, this court and others have abstained under *Younger* in considering similar challenges to state investigations. *See. e.g., Law Firm of Daniel P. Foster, P.C. v. Dearie*, 613 F. Supp. 278, 280 (E.D.N.Y. 1985) (finding grand jury subpoena constituted pending state criminal proceeding). *See also Kingston v. Utah County*, 161 F.3d 17, 1998 WL 1614462, at *4 (10th Cir. Sept. 8, 1998) (holding that abstention is appropriate where plaintiff filed federal

complaint knowing that state criminal charges were imminent); *Kaylor v. Fields*, 661 F.2d 1177, 1182 (8th Cir. 1981) (finding pending state criminal proceeding where prosecuting attorney had issued subpoena).

Turning to the second prong, *Younger* abstention requires that an important state interest be implicated. As the N.Y. Judiciary Law §478 makes it unlawful to practice law without being admitted and registered, McKinney's 1983, New York's interest in enforcing the unlawful practice of law satisfies this test.

In addition, Pugach has an adequate opportunity to challenge the investigation in state proceedings as soon as an indictment issues. *See Nick*, 717 F. Supp. at 1057. Moreover, Pugach has failed to explain why he could not seek an injunction against Brown, a state official, in state court. *Schiavone Construction Co. v. New York City Transit Auth.*, 593 F. Supp. 1257, 1262 (S.D.N.Y. 1984) ("[Any] harm that plaintiff[] might suffer . . . can be remedied in a manner far more direct and less intrusive than federal court intervention in the state's criminal investigation.").

Where these factors are satisfied, *Younger* abstention is required absent a suggestion that the proceeding was brought in bad faith or with an improper motive. *See Schlager v. Phillips*, 166 F.3d 439, 442 (2d Cir. 1999) (finding no subjective bad faith by defendant). Pugach, in essence, also contends that this case' falls within the *Younger* bad-faith exception. Pugach alleges that defendant Brown has a vendetta against him as a result of the 1996-97 trial (*see Pl.'s Mem. Law* at 20), and that Brown and his subordinates are

groping for excuses (*id.* at 13) to frame him (*id.* at 18), in an attempt to kill off his business (*id.* at 16). The Second Circuit has determined that a *Younger* exception may be justified where the criminal proceeding is discriminatory, arbitrary, or brought in order "to retaliate for or to deter constitutionally protected conduct ... or ... to harass." *See Cullen v. Fliegner*, 18 F.3d 96, 103 (2d Cir. 1994).

It is undisputed that Pugach has previously been the subject of defendant Brown's investigations. (*Pl.'s Mem. Law* at 5-7.) However, this fact alone is not enough to demonstrate bad faith or harassment of Pugach by Brown. *See Perez v. Ledesma*, 401 U.S. 82, 85, 91 S. Ct. 674, 677 (1971) (finding that bad faith requires a showing that prosecution was brought without hope of obtaining a conviction); *see also Schiavone*, 593 F. Supp. at 1260 ("[P]laintiff's conclusory statements regarding the alleged political motivation underlying the state's investigation fall short of the concrete evidence of retaliation or ... bad faith."). In fact, as Queens County District Attorney, Brown has an obligation to investigate alleged crimes within his jurisdiction, and has discretion over "when and in what manner" to pursue criminal proceedings. *See Baez v. Hennessy*, 853 F.2d 73, 77 (2d Cir. 1988). Because N.Y. Judicial Law §478 provides for the specific allegation under which defendant Brown is investigating Pugach, it cannot be stated conclusively that defendant Brown has no basis for the investigation. *See Schlager*, 166 F.3d at 443-44 (finding that defendant acted "within his discretion as District Attorney" in beginning criminal proceedings).

For all of these reasons, Pugach has not demonstrated that federal injunctive relief is justified at this stage in the

criminal investigation. Further, as abstention in the spirit of *Younger* is appropriate in this proceeding, Brown's motion to dismiss should be granted.

CONCLUSION

Because Pugach has failed to establish either irreparable harm or a likelihood of success on the merits, his requests for injunctive relief are denied. Defendants motions to dismiss all claims should be granted.

Dated: Brooklyn, New York
August, 2001

SO ORDERED:

s/ David G. Trager
David G. Trager
United States District Judge